IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

VIKING PUMP, INC.,

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY and WARREN PUMPS LLC,

Defendants.

LIBERTY MUTUAL INSURANCE COMPANY,

Counterclaim-Plaintiff,

v.

VIKING PUMP, INC. and WARREN PUMPS, LLC,

Counterclaim-Defendants.

VIKING PUMP, INC.,

Third-Party Plaintiff,

v.

JOHN CRANE, INC.,

Third-Party Defendant.

C.A. No. 1465-VCS

MEMORANDUM OPINION

Date Submitted: February 28, 2007
Date Decided: April 2, 2007

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STRINE, Vice Chancellor.

I. Introduction

In this insurance coverage dispute, the issue pending before the court is whether an entity, "New Warren," that, in 1985, purchased a division of another entity, "Houdaille," obtained the right to use Houdaille's pre-existing insurance to cover tort claims related to products the division manufactured during the period when Houdaille owned it. For a generation, the insurer in question, "Liberty Mutual," has been covering claims of this type, at New Warren's request, and with the knowledge of Houdaille and its successor, "John Crane."

In this decision, I conclude that the original sales contract by which New Warren acquired the relevant division from Houdaille is ambiguous as to the extent to, and method by, which New Warren could use Houdaille's insurance for claims of this type. The relevant evidence is also ambiguous as to whether Liberty Mutual consented to any such arrangement in the first instance.

But those ambiguities do not prevent a grant of summary judgment in New Warren's favor on its claim that it has properly used Houdaille's insurance over the last twenty years and that it is entitled to continue to do so. For an unbroken generation, Liberty Mutual, with Houdaille's consent and knowledge, provided coverage to New Warren, allowing New Warren to utilize Houdaille's primary coverage in the first instance, with access to Houdaille's excess coverage after the primary coverage was exhausted.

This practical course of dealing reflects a reasonable reading of the original sales agreement, and is the best evidence of the original intent of the parties. More

importantly, however, it also reflects an agreed resolution of any dispute about the ambiguity by the key parties — Houdaille, the seller; New Warren, the buyer; and Liberty Mutual, Houdaille's insurer. That resolution has been implemented by the parties in a consistent course of dealing spanning twenty years. Given this undisputed interpretation, if it be that, or after-the-fact resolution of an interpretative difference, another likely reality, New Warren's motion seeking a declaration that it is entitled to use Houdaille's old insurance policies must be granted. Liberty Mutual is in no legal or equitable position to re-trade a deal it made when *Family Ties* was still on the air, especially when the resolution that the parties reached then was beneficial to Liberty Mutual.

II. The Procedural History And The Parties Involved

I begin this opinion with a discussion of Houdaille Industries, Inc. Although no longer in existence and not a party to this lawsuit, Houdaille is the common link by which all of the parties to this lawsuit are connected.

Houdaille was a large industrial conglomerate corporation that operated a number of different businesses during the 1970's and 1980's. One of the businesses that Houdaille owned was an industrial pump manufacturing business located in Warren, Massachusetts, which has been in continuous operation since 1897. That business is the primary focus of this opinion and I refer to it as "Warren Pumps." Houdaille acquired Warren Pumps when it bought all of the stock of a Massachusetts corporation called Warren Pumps, Inc. ("Old Warren") in 1972. Houdaille held Old Warren as a wholly-

owned subsidiary until 1979 when Houdaille merged Old Warren into itself.[1] Houdaille then operated Warren Pumps as an unincorporated division until 1985. That year, it sold Warren Pumps to a newly created entity, W.P., Inc., which I refer to as "New Warren."[2]

Houdaille's 1985 sale of Warren Pumps was one of a number of transactions Houdaille entered into in the mid-to-late 1980's, through which it divested itself of all of its subsidiaries and operating assets. By 1989, Houdaille had completed selling itself off piecemeal to various purchasers and had essentially ceased to exist. I refer to this series of transactions collectively as the "Houdaille Divestment." In addition to the 1985 Warren Pumps transaction, another of those transactions, Houdaille's 1987 sale of its Viking Pump subsidiary is of particular importance to this case. The reason is that during the time Houdaille owned Warren Pumps and Viking Pump, both of those businesses manufactured products that contain asbestos and they now face numerous tort claims for the harm that those products allegedly caused.

For many years, both New Warren and Viking Pump have sought and received coverage under old insurance policies (the "Houdaille Policies") that Liberty Mutual Insurance Company sold to Houdaille. This lawsuit began when New Warren and Viking Pump began to face an increase in the number of asbestos claims relating to the era when

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[1] *Id.* at ¶ 5. Also at issue in this case are a series of insurance policies that Liberty sold to Old Warren from 1936-1969. New Warren also seeks a declaration that it is entitled to continued coverage under these "Warren-Only Policies." Houdaille acceded to all of Old Warren's rights under the Warren-Only Policies when it merged with Old Warren in 1979. As a result, the same analysis essentially applies to the "Warren-Only Policies" and I hold that New Warren is entitled to coverage under them.

[2] W.P., Inc., having acquired the rights to the Warren Pumps name changed its name shortly after the 1985 transaction to Warren Pumps, Inc. During the 1990's, it converted to a limited liability company and is now known as Warren Pumps, LLC.

their operations were owned by Houdaille. Viking Pump brought suit against Liberty Mutual in 2005, nearly twenty years after New Warren came into existence, seeking to apportion the available coverage — which was limited in total — evenly between New Warren and Viking Pump. Viking Pump argued that New Warren was using up too much of the Houdaille policy limits and that Liberty was not being an even-handed insurer by failing to limit New Warren's coverage. When New Warren intervened in this action, Liberty Mutual took the position that New Warren was actually not entitled to coverage at all. Liberty's decision to challenge New Warren's entitlement to the coverage it had consistently granted for a generation might be most logically explained by its discomfort at being caught in the middle and its desire to immunize itself against the claims of favoritism lodged against it by Viking Pump. Viking Pump has now joined Liberty in arguing that New Warren is not entitled to any coverage at all. This opinion resolves the parties' cross-motions for partial summary judgment on whether New Warren is entitled to be treated as an insured under the Houdaille Policies.

Why is New Warren's right to coverage being challenged but not Viking Pump's? The answer to that question lies in the different forms that the Viking Pump and the Warren Pumps transactions took. When Houdaille sold Viking Pump, it sold 100% of the stock of its Viking Pump subsidiary. Viking Pump's corporate identity did not change. On that basis, the parties have now agreed that Viking Pump is entitled to coverage under the Houdaille Policies for claims related to products Viking Pump manufactured during the time Houdaille owned it. The Warren Pumps transaction, by contrast, was an asset sale. New Warren as a legal entity did not exist before the transaction. As such, the parties agree

that New Warren is not entitled to coverage by reason of its corporate pedigree. Whether New Warren is entitled to coverage under the Houdaille Policies turns on whether Houdaille and Liberty agreed to let New Warren use them. This opinion focuses on that question.

The final player involved in this case is John Crane, Inc. John Crane is essentially what is left of Houdaille following the Houdaille Divestment. John Crane became the "owner" of the Houdaille Policies in 1989 when Houdaille transferred the remainder of its assets, including its insurance assets, to John Crane in exchange for John Crane's assumption of all of Houdaille's liabilities. John Crane is the only party to this lawsuit that has not filed a motion or taken any position on whether New Warren is entitled to coverage under the Houdaille Policies. John Crane has generally stated, though, that it does not object to New Warren's coverage under those Policies so long as New Warren pays all of the costs associated with that coverage.[3]

III. Factual Background

Most of the events giving rise to this lawsuit happened more than twenty years ago. Understandably, many of the participants in the underlying events have little, if any, recollection of them. Given the ephemeral nature of human existence, it is also not

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[3] *See* Oral Argument Transcript, Dec. 4, 2006 ("December Argument Tr.") at 124. New Warren seizes on John Crane's position, arguing that the acquiescence of John Crane, the successor to Houdaille, in New Warren's seeking of coverage under the Houdaille Policies compels me to accept New Warren's position on the contract interpretation question that I discuss in this opinion. That odd contention is premised on the contract law principle that "where the parties to a contract have attached the same meaning to a promise or agreement . . ., it [must be] interpreted according to that meaning." Restatement (Second) of Contracts § 201(1) (1979). But I note that John Crane has explicitly stated that it has taken no position on the issues involved in these motions and has thus attached no meaning to any contract terms. In any event, because I conclude that New Warren is entitled to coverage on other grounds, I need not address that argument.

surprising that many of the people who would be expected to provide the most useful knowledge have died. Despite being fulsome in a few senses, the original record was devoid of evidence about Liberty's actual processing of the claims filed by New Warren under the relevant Houdaille policies. I therefore asked the parties to supplement the record to fill out that important gap.[4] In response, the parties essentially admitted that much of the testimonial evidence that would be most helpful in understanding the twenty-year course of events involved in this case is unobtainable.[5] As a result, there are numerous gaps in the record that make formulating a coherent picture of the facts of this case more-than-typically difficult.

Notably, however, the gaps would not be solved by a trial. They are the product of the passage of time and the inefficiency, unfairness, and inaccuracy that necessarily arises when parties seek to contest generation-old decisions in an untimely manner. Fortunately, the record contains reliable and undisputed evidence of what the key parties *did*, and *did repeatedly*, about the key coverage issue in dispute. For all of those reasons, in this fact section, I recite the undisputed facts as I discern them from the record, focusing as much as possible on the business objectives underlying the parties' conduct, and on what the parties actually did and when, which are the primary factors requiring a decision in New Warren's favor.

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[4] *See* Letter to Counsel, Feb. 8, 2007 (instructing counsel to supplement the existing record with respect to the behavior of the parties in the years following the Warren Pumps transaction and the provision of coverage by Liberty to New Warren during those years).

[5] *See* Stipulation of Facts, Feb. 28, 2007 ("Stipulation") at ¶¶ 39, 40, 44.

A. The Houdaille Policies

The Houdaille Policies at issue in this case are a series of one-year primary and excess insurance policies, which provide coverage on an occurrence basis.[6] They cover all claims related to asbestos exposure that occurred during the policy period, regardless of when the claim is asserted. For example, if an asbestos plaintiff worked around a product manufactured by Warren Pumps and was thereby exposed to asbestos in 1976, did not experience symptoms until twenty years later, and filed suit in, say, 1999, that loss would be covered by the 1976 occurrence-based policy.

For each coverage year, the Houdaille Policies consisted of a primary liability policy, a first-layer excess policy, and additional layers of excess coverage. Liberty was Houdaille's primary and its first-layer excess coverage provider.[7] The Houdaille Policies have set policy limits and therefore provide only a finite amount of insurance coverage. The way insurance policies of this type work is that when an insured is sued, the insured first seeks coverage under the primary policy for the applicable year and must use that, and only that, policy until that policy's limits are exhausted. It can then seek coverage under the first-layer excess policy for the applicable year until that excess policy's limits are exhausted. It then proceeds in the same fashion through the additional layers of excess coverage.

The named insureds under the Houdaille Policies are Houdaille and "[a]ny other business organization while [Houdaille] owns an interest therein of more than 50% during

[6] Houdaille had a primary and excess insurance policy from Liberty Mutual in place for each year during which it owned Warren Pumps.

[7] Affidavit of Jennifer Devery ("Devery Aff."), Ex. A at Ex. 2.10(1). Houdaille had additional layers of excess coverage through other providers. New Warren's right to coverage under those additional layers of excess coverage is the subject of ongoing litigation in Massachusetts.

the policy period."[8] Each of the Houdaille Policies contained an anti-assignment clause providing that any "assignment of interest under this policy shall not bind [Liberty] until its consent is endorsed hereon."[9] The Policies also contained a non-waiver clause, stating that

> Notice to any agent or knowledge possessed by any agent . . . shall not effect a waiver or a change in any part of this policy or estop the company from asserting any rights under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.[10]

The total amount of coverage under the Houdaille Policies changed from year to year. The primary policy limit grew from $500,000 in 1972 to $2 million in 1985.[11] The primary policies, however, account for only a small portion of the coverage that is implicated in this lawsuit. In 1985, for example, Houdaille had approximately an additional $73 million in excess coverage in place, meaning that Houdaille was insured for up to approximately $75 million in losses attributable to occurrences taking place in 1985 alone.[12] Combined with all of the other policies from all fourteen coverage years involved, there are several hundred million dollars of insurance coverage in question.

Much of the complexity in this case stems from certain "loss-sensitive" features of Houdaille's primary policies. The primary policies from at least 1976 on carried both high deductibles and retroactive premiums.[13] The gist of those policy features is that when a plaintiff asserts a claim against Houdaille, the primary insurer, here Liberty, often pays the

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[8] Affidavit of Victoria Kummer ("Kummer Aff."), Ex. 4.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Devery Aff., Ex. A at Ex. 2.10(1).
[13] Kummer Aff., Ex. 5.

full claim, subject to the limits of the primary policy. Liberty is then entitled to seek reimbursement from Houdaille for the deductibles associated with that claim.[14] Those deductibles were substantial, amounting to $100,000 per occurrence in most of the policy years. Liberty also becomes entitled to bill Houdaille for a retroactive premium measured by a percentage of the total claims paid out under the policy. The result is that every time a claim is made against one of Houdaille's primary policies, it costs Houdaille a substantial amount of money.

Importantly, the excess policies, unlike the primary policies, do not have those loss-sensitive features.

B. The Asset Sale Agreement And The Amendment

In the spring of 1985, a group of senior managers at Houdaille's Warren Pumps division decided to propose a leveraged buyout and formed New Warren for the purpose of acquiring the Warren Pumps assets. On June 21, 1985, Houdaille entered into an Asset Sale Agreement (the "ASA") with New Warren. The purchase price was $35 million.[15]

The ASA allocated to New Warren all liabilities associated with Warren Pumps that would arise post-closing, including all claims asserted post-closing that were related to pre-closing occurrences (i.e., product liability claims related to products Warren Pumps manufactured during the time Houdaille owned it).[16] But notwithstanding New Warren's assumption of those liabilities, the ASA, as originally drafted, made clear that New Warren

[14] Alternatively, Liberty could opt not to pay any indemnity or defense costs until the amount of the claim exceeded the deductible.
[15] Devery Aff., Ex. A at § 1.06.
[16] *Id*. at § 2.10.

was not being granted any rights to insurance coverage under the Houdaille Policies for the liabilities it was assuming. Rather, § 2.10 required New Warren to obtain at least $25 million of its own coverage on a claims-made basis. This "claims-made" coverage, as contrasted with occurrence-based coverage, would cover all claims asserted against New Warren during a policy year even though the claims were attributable to occurrences (such as exposure to harmful asbestos particles) from earlier years.[17]

There were two reasons the parties originally structured the deal this way. First, Houdaille wanted to avoid the administrative hassle of being involved in insurance claims related to Warren Pumps after the closing.[18] More importantly, as stated, it was expensive for Houdaille to use its primary insurance policies. Houdaille did not want an entity that it had no control over to cause it to incur costs for deductibles and retroactive premiums. Rather, Houdaille wanted to cleanse its balance sheet by pushing off onto New Warren all of the costs for the contingent liabilities related to pre-closing occurrences that had not yet ripened into actual asserted claims.[19]

The problem that arose, however, was that adequate claims-made insurance coverage proved prohibitively expensive. New Warren was ultimately able to obtain only $1 million

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[17] New Warren's claims-made policy had what is known in the insurance industry as a "tail" or "retroactive date" going back to 1976. What this means is that the 1986 claims-made policy covered all claims asserted in 1986 relating to occurrences going back to 1976, but no further. The policy would not cover claims related to occurrences from 1975 and earlier. There is evidence in the record that Houdaille had insisted that New Warren's claims made policy cover occurrences going back at least to 1976 because it was only from 1976 on that Houdaille was exposed to the loss sensitive features of its primary policies. According to Houdaille's Treasurer, Wayne Sayatovic, as of May 1985, Houdaille's "cost-plus" programs with Liberty were "closed prior to January 1, 1976." Kummer Aff., Ex. 24.
[18] Deposition of Donald Boyce ("Boyce Dep.") at 43. Donald Boyce was Houdaille's CEO during the relevant period. *Id.* at 11.
[19] *Id.* at 17-18; Deposition of Wayne Sayatovic ("Sayatovic Dep.") at 143-46.

worth of primary claims-made coverage and no excess coverage for the pre-closing occurrences.[20] New Warren's inability to satisfy the terms of § 2.10 was a deal breaker for both parties. The 1985 management buyout of Warren Pumps was very highly leveraged and was described by one of the investment bankers involved as one of the most heavily-lawyered transactions he had ever seen.[21] New Warren's insurance problems made its lenders, who were closely involved in all aspects of the negotiations, very nervous. The lenders threatened to put the kibosh on the deal unless New Warren fully complied with all of the provisions of the ASA, including the insurance provisions.[22] From Houdaille's perspective, a solution was also necessary. If New Warren was not solvent or was otherwise unable to cover the Houdaille-era liabilities it would assume in the transaction, Houdaille would remain a target of asbestos and other plaintiffs and thus would not truly have shorn itself of future liabilities.

The solution the parties arrived at was a five-page letter agreement entered into at the closing, which changed § 2.10 in important ways. I refer to those changes as the "Amendment." Although the Amendment retained much of the language of the original § 2.10, including the provision that New Warren was solely responsible for all claims asserted against Warren Pumps post-closing, it added two passages that purport to transfer certain rights to the Houdaille Policies. The first of those passages states as follows:

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[20] Devery Aff., Ex. B.

[21] Deposition of Robert Dimmit ("Dimmit Dep.") at 19. Robert Dimmit, one of the investment bankers involved in the deal testified that the management group that led the transaction put in only $2 million in equity, with the rest of the $35 million purchase price being funded with debt. *Id.*

[22] *Id*. at 13-14 & 18-19.

> [New Warren] shall insure against such responsibility and liability through its primary insurance on a claims made basis, *through excess coverage insurance for losses in excess of the primary insurance limits which . . . Houdaille ha[s] in force for occurrences prior to the closing*, and through excess coverage insurance, which [New Warren] shall have in place effective as of the date of Closing, for occurrences on or subsequent to the date of the Closing.[23]

In the next paragraph, the Amendment acknowledges the $1 million primary liability insurance limit for the claims-made policy that *New Warren* was able to procure — that is, that paragraph's only reference to insurance limits is to those of New Warren. The paragraph immediately thereafter then states:

> [New Warren] . . . and Houdaille acknowledge that . . . Houdaille ha[s] permitted [New Warren] to utilize *the insurance coverage in excess of the primary casualty limits identified above*, which . . . Houdaille ha[s] in effect, for claims made pertaining to occurrences prior to the date of the Closing, but only to the extent that such insurance coverage is in fact available. . . . Houdaille shall have no liability to [New Warren] or to any other party if, for any reason, such excess insurance coverage is not in fact available or not otherwise effective as to any party, including, without limitation, [New Warren]. It is expressly understood that . . . Houdaille shall have no liability for any claims made on the day of or subsequent to the date of the Closing, except only those claims for which insurance coverage relative to occurrences prior to the date of the Closing is actually available and provided for in that insurance coverage of . . . Houdaille which is in excess of the primary insurance to be carried by New Warren; and provided further that in no event shall . . . Houdaille have any liability to New Warren with respect to claims made on the day of or subsequent to the date of the Closing. It is further agreed that [New Warren] shall reimburse . . . Houdaille for any out-of-pocket costs (including, without limitation, reasonable attorneys' fees and disbursements) which . . . Houdaille may incur in connection with filing claims and recovering payment under . . .

[23] *Id*. (emphasis added).

> Houdaille's insurance coverages with respect to claims asserted after the date of the Closing.[24]

Once the Amendment was finalized, Houdaille agreed to go forward and the lenders funded the transaction, which closed on September 3, 1985.

C. The Extrinsic Evidence Regarding The Negotiation Of The Amendment

The parties do not dispute that the Amendment was designed to solve the problem of New Warren's inability to buy adequate insurance to cover the liabilities it was assuming. The parties also agree that the Amendment intended to use the Houdaille Policies in some manner to solve that problem. All of the extrinsic evidence presented by the parties regarding the negotiations suggests that everyone's general understanding was that the Amendment granted New Warren the right to use Houdaille's insurance in the event that New Warren's $1 million claims-made primary policy proved inadequate.[25]

But although the parties agree that the Amendment intended to transfer some insurance rights, they disagree over the nature of those rights. The disagreement centers on the distinction between Houdaille's primary and excess policies and the loss sensitive features that apply only to the primary policies. Liberty contends that Houdaille did not

[24] *Id.* (emphasis added).

[25] *See* Deposition of George Landberg, Warren Pumps's chief executive during the relevant period, ("Landberg Dep.") at 18-19 ("[T]he intent of it is that to the extent to which [New Warren] could get coverage on its own, that would be used, but to the extent to which additional coverage to meet the full requirements of the agreement might be needed, that would be available from Houdaille's policies.); Deposition of Alfred Scott, an investment banker involved in the Warren transaction, ("Scott Dep.") at 32 ("To the best of my recollection, when we couldn't meet the requirements of the purchase and sale agreement [Houdaille] proposed that we utilize the insurance that Houdaille already had in place by renting it or piggybacking on it."); Dimmit Dep. at 18 (stating that New Warren was expected to insure "[t]hrough the insurance obtained through the management group's insurance broker, plus the additional insurance provided by Houdaille through the contract at the closing").

agree to allow New Warren to submit claims under its primary policies, which carried with them costs for deductibles and retroactive premiums. Rather, Liberty contends that the ASA only granted New Warren rights to use Houdaille's excess policies, which did not contain those loss-sensitive features.[26]

Importantly, the terms of Houdaille's excess policies would have effectively prevented that arrangement from solving New Warren's insurance problem. Coverage under Houdaille's excess policies was not available until *Houdaille's* primary policy limits were exhausted. Unless the excess policies were modified, New Warren could not go directly from its own primary policy to Houdaille's excess policies without first going through Houdaille's primary policies. The parties refer to the necessary modification as a "cut-through endorsement," which only Liberty could have given. As such, Liberty contends that the ASA's grant of rights to the excess policies was contingent on Liberty issuing the cut-through endorsement.

In support of its contention that the parties intended this conditional arrangement, Liberty (somewhat gracelessly) points to evidence which suggests that at the time the Amendment was executed, Liberty had led Houdaille to believe that Liberty would agree to give the cut-through endorsement.[27] Ultimately, though, Liberty never issued a formal

[26] *See, e.g.,* Liberty's Opening Brief in Support of its Motion For Summary Judgment ("Liberty Op. Br.") at 36.
[27] *See* Devery Aff., Ex. P (memo written on August 29, 1985 by Wayne Sayatovic, Houdaille's Treasurer, stating, "Hank Billeter of Liberty called to say that . . . language would be written to have the claims exceeding [New Warren's] primary limits for the retro period go directly through to the first layer of the Houdaille umbrella, effectively bypassing Houdaille's occurrence form primary protection.").

endorsement and it now claims that because that condition precedent did not occur, the Amendment did not transfer any coverage rights to New Warren.

As important, Liberty never executed a policy endorsement recognizing New Warren as an insured under the Houdaille Policies. As a result, Liberty claims that even if the Amendment did transfer rights to New Warren, the Houdaille Policies' anti-assignment clauses permit it to deny coverage to New Warren, an entity that it never formally promised to insure.

D. The Post-Closing Communications Between Houdaille And Liberty

After the closing of the Warren Pumps transaction, Houdaille learned that Liberty was refusing to issue a cut-through endorsement, although it is unclear precisely when that happened. Houdaille became concerned, not only because of the issues involved in the Warren Pumps transaction, but also because Houdaille was contemplating similar insurance arrangements with respect to sales of other of its business units.[28] In particular, Houdaille sold a number of its subsidiaries to Stanwich Industries, Inc. in an April 1986 stock sale.[29] Houdaille inserted language into that agreement (the "Stanwich Stock Purchase Agreement") that is similar to the language in the Amendment.[30]

The disagreement about the cut-through endorsement issue is reflected in a series of letters and memoranda in early 1986 involving Houdaille, Liberty, and Houdaille's insurance broker, Ron Morrison from Marsh & McLennan. In that correspondence, Morrison expressed frustration with Liberty over what he perceived to be a reversal of its

[28] *See* Stipulation, Exs. 1 & 3.
[29] Stipulation at ¶ 37, n.1.
[30] *See* Stipulation, Ex. 7 (discussing § 6.02(f) of the Stanwich Stock Purchase Agreement).

prior position over granting a cut-through endorsement.[31] Importantly, Ron Morrison was also involved in selling New Warren its claims-made policy,[32] and there is no evidence in the record that he or anyone else involved New Warren in the communications about the cut-through endorsement.

Around this time, Houdaille was also communicating with Liberty regarding the insurance issues raised by the Houdaille Divestment more generally. For example, on May 12, 1986, Houdaille wrote to Liberty, asking it to "outline[] . . . exactly the procedures that should be followed, by both Houdaille and [the various buyers], in order to ensure that both the parties' interests are protected . . . ."[33] In these communications, Houdaille often discussed the issues by reference to the Stanwich transaction, but was careful to make clear that it was asking for guidance with respect to all of the transactions in the Houdaille Divestment, including the Warren Pumps transaction.[34] Those communications prompted Liberty to engage a number of different individuals in its process of trying to decide how to handle the insurance issues that the Houdaille Divestment posed, which I discuss now.

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[31] *See* Affidavit of Matthew Buckley ("Buckley Aff."), Ex. 1 (letter from Ron Morrison to Houdaille dated March 25, 1986, stating, "we were surprised to learn that our understanding was not shared by Liberty Mutual. . . . If Liberty had indicated, as they are now, that they would have to access Houdaille's Primary policy before accessing Houdaille's Umbrella Excess policy, then we certainly would have recommended to both Houdaille and Warren Pumps that other methods be developed to accomplish Houdaille's goals of transferring their liabilities to Warren Pumps."); *Id.* at Ex. 3 (letter from Houdaille to Liberty: "You recently told us that our understanding . . . is incorrect. You are now saying that if the previously purchased Houdaille coverage would respond, it will be necessary to have the Houdaille primary coverage, subject to a deductible, initially respond before the first layer of umbrella is accessed. We are very concerned by this change of understanding which has developed on the part of Liberty and we do not agree.").

[32] *See* Buckley Aff., Ex. 3.

[33] *Id.*

[34] *See, e.g.,* Stipulation, Ex. 2 (letter from Houdaille to Liberty stating, "[t]hough this letter specifically relates to the Stanwich situation it should be realized that essentially the same questions pertain to the Warren Pumps and the proposed Norwood transactions").

E. Liberty's Internal Correspondence And Decision-Making Process

Houdaille's main contact at Liberty during the time leading up to and following the closing of the Warren Pumps transaction was Hank Billeter. Of crucial importance is that in 1986, Billeter personally reviewed the ASA,[35] and that Liberty has admitted in this litigation to having maintained a copy of a draft of the Amendment in its permanent files since as early as April 3, 1986 at the latest.[36] Those undisputed facts mean that Liberty had all of the information it needed by April 1986 to make an informed decision about whether and how it would permit New Warren to obtain access to the Houdaille Policies.

The record reflects that Liberty was cautious in this decision-making process. In the summer of 1986, Liberty asked its in-house attorneys to prepare a legal opinion discussing the insurance issues raised by the Houdaille Divestment. That legal opinion exclusively addressed the Stanwich transaction and performed its analysis on the assumption that the transactions were stock sales. It explicitly states, "If the mechanics of the transaction differ from this assumption, or if the subsidiaries were not corporations, the resulting analysis would also differ."[37] In this regard, it is important that Billeter had reviewed the ASA and was thus aware both of the Warren Pumps transaction's terms and its form (i.e., that it was an asset sale). Although the Warren Pumps asset sale differed substantially from the Stanwich stock sale, Billeter lumped the two transactions together in discussing the relevant issues, stating in a September 2, 1986 memo, "there are two separate but similar coverage

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[35] Buckley Aff., Ex. 3 (noting that Billeter had reviewed the "Warren contract").
[36] Kummer Aff., Ex. 35 (New Warren's First Set of Requests For Admission ("RFA's") to Liberty, No. 23).
[37] Stipulation, Ex. 7.

situations: I. Warren Pumps[;] II. Stanwich Industries."[38] In other words, despite the fact that Liberty's lawyers informed Liberty that the form of the particular transactions was important from a technical legal perspective, Liberty never considered this to be a factor in making its decision about how the Houdaille Policies would respond for New Warren. As important, Liberty never communicated to Houdaille or to anyone else in 1986 or 1987 that the form of the various transactions (i.e., asset sale vs. stock sale) would alter Liberty's position on how the Houdaille Policies would respond to the liabilities that the buyers were assuming.

Ultimately, Liberty's attorneys were unable to give Liberty much guidance, primarily because of the ambiguity in the insurance provisions of the contract they reviewed, the Stanwich Stock Purchase Agreement.[39] Liberty's lawyers made clear though that they believed the contract was effective in divesting Houdaille of the liabilities related to the sold business, stating explicitly that "Houdaille [was] absolved of liability and won't be utilizing its coverage."[40]

Liberty's position after having received the legal opinion is summed up in an internal memo written by Hank Billeter, dated September 2, 1986. It suggests that Liberty was still unsure how to proceed:

> I have delayed responding to [Houdaille's] letter until I had the Legal Department's opinion as to coverage as it relates to the

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[38] Buckley Aff., Ex. 3.
[39] Stipulation, Ex. 7 ("To be frank, I'm not sure what is intended by this clause. . . . In my view, [it] seems meaningless. . . . We should try to clear up what is meant by this provision and structure our policies accordingly.").
[40] *Id.*

> complicated arrangements to our insurance coverage [sic] and the various contents of sales between Houdaille and others.
>
> As you will recall Houdaille has wanted to use their current Umbrella coverages to protect them should any loss come back to them for a loss that has occurred prior to the date of sale but reported after the date of sale. In fact they wanted to "rent" their old "paid for" limits to the new owners. I have made it clear that they cannot "rent" such coverage.
>
> I have never given them any opinion as to how the Liberty Umbrella will be accessed if the loss is over the limits of the new owners "claims made" policy. Houdaille hears what they want to hear. . . .
>
> My discussions with Houdaille have always indicated that our Umbrella would respond for Houdaille, but not for the new owners of the sold companies. I have never indicated as to how they would respond — nor did I do so to Ron Morrison at Marsh & McLennan. My conversations with Ron have been about the primary coverage being proposed for Warren Pumps (where Ron wrote the Umbrella coverage and Property insurance) . . . .
>
> *I must now respond as to how Houdaille would gain access to our 'first layer' Umbrella coverage. Do they respond after the Liberty Primary written for Warren Pumps or Stanwich Industries have been exhausted or do we go the Houdaille Liberty Primary [sic] after the Liberty Warren/Stanwich contracts have been exhausted?*[41]

The fact that Billeter noted that he had never told Houdaille that the Houdaille Policies would "respond . . . for the new owners of the sold companies" is important. It appears that, at this time, Liberty was still considering the option of refusing to provide coverage to New Warren at all under the Houdaille Policies. But there is no evidence in the record that this position was ever communicated to Houdaille or New Warren.

[41] Buckley Aff., Ex. 3 (underline emphasis in original; italics emphasis added).

As of early 1987, the insurance issues that Houdaille raised with Liberty were still not resolved.[42] Instead of giving Houdaille a concrete answer as to how its contractual arrangement with New Warren would work in practice, Liberty took a wait-and-see approach, thinking it more prudent not to document its position until an actual situation arose to require a decision.[43] Liberty eventually did give Houdaille specific instructions for the processing of claims related to the subsidiaries involved in the Stanwich transaction,[44] but apparently did not give such instructions as to the Warren Pumps situation, at least the parties have not been able to come up with any. But once New Warren began filing claims, Liberty did reach a practical understanding with Houdaille and New Warren about how to handle New Warren's asbestos-related lawsuits. I discuss how that practical understanding came about next.

F. Liberty Inserts An Asbestos Exclusion Into New Warren's Claims-Made Policy And Defends New Warren's Early Asbestos Claims Under Houdaille's Primary Policies

Beginning September 3, 1986, Liberty inserted an asbestos exclusion into New Warren's primary claims-made policy.[45] There is no evidence in the record regarding any discussions among the parties that led to the asbestos exclusion or how any of the parties

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[42] Kummer Aff., Ex. C (internal Liberty memorandum dated March 1987, noting that Houdaille "still wants some type of concrete response in this regard and, as I noted previously, such a response should definitely, in my opinion, come from Home Office Legal or through Division directly to the policyholder").

[43] *See* Stipulation, Ex. 11 (reflecting an internal Liberty memo which states: "We have a variety of . . . contractual arrangements . . ., the potential for misunderstanding the intent of the contract (let's see who does what when that first blockbuster case turns up), and much potential for conflict. There are so many variables that enter into this type of scenario that it is difficult to draw up any firm rules about claims handling. I would hesitate to recommend that we should document our 'position' in writing which, apparently, [Houdaille] expects us to do.").

[44] Stipulation, Ex. 15.

[45] Affidavit of Thomas O'Brien ("O'Brien Aff."), Ex. J.

reacted to it. But that exclusion was important. It meant that New Warren's own primary policy would not respond in the first instance to any asbestos claim stemming from the Houdaille era. The question then became whether New Warren could look to Houdaille's excess policies or whether it had to go first to Houdaille's primary policies to cover such a claim.

The first asbestos suit against New Warren came about a year later. On October 28, 1987, New Warren submitted its first asbestos-related claim to Liberty. Only a single piece of correspondence regarding that claim has been submitted as part of the record in this case. That document, a letter from New Warren to Liberty's claims department giving notice of the suit and enclosing related documents and court papers, mentions neither the recent back-and-forth between Houdaille and Liberty nor the asbestos exclusion that applied to New Warren's claims-made policy. The letter simply states that "[i]t is very possible that any necessary coverage for this situation could come from old occurrence policies in the 1950's, 1960's or early 1970's."[46]

Liberty admits that it classified New Warren's 1987 claim, the "Pierson Claim," as an asbestosis claim.[47] It further admits that it defended and paid the Pierson Claim under the 1985 Houdaille primary policy.[48] The parties have stipulated that they are unaware of any communications among New Warren, Liberty, and Houdaille concerning, or any documents reflecting, Liberty's decision to cover the Pierson Claim under Houdaille's

[46] Kummer Aff., Ex. 36.
[47] Kummer Aff., Ex. 35 (New Warren's First Set of RFAs to Liberty, No. 14).
[48] *Id*. at Nos. 15 and 16.

primary policy.[49] There is no evidence in the record that Liberty attempted to reserve any rights with respect to this coverage or that it attempted to preserve any coverage defenses.

On July 20, 1988, New Warren notified Liberty of another asbestos lawsuit in which it was named as a defendant.[50] Liberty also admits that it defended and paid this claim, the "Atkisson Claim," under the 1985 Houdaille primary policy.[51] On August 16, 1988, Liberty sent New Warren a letter advising New Warren that Liberty had retained defense counsel on New Warren's behalf.[52] That letter states that "[t]here are certain questions that must be answered before we can determine whether or not this claim is covered by your insurance policy" and advises New Warren of Liberty's "reservation of all of our rights under the policy contract."[53]

There is no evidence in the record suggesting that Houdaille objected to New Warren's obtaining access to coverage under the Houdaille primary policies. Following the closing of 1985 Warren Pumps transaction, "Warren Pumps" continued to be listed as a line item on the Retrospective Premium and Dividend Adjustment Reports (the "Premium Reports") that Liberty sent annually to Houdaille to keep it informed of the charges being incurred for retroactive premiums.[54] The Premium Reports for 1986 and 1987 show no

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[49] Stipulation at ¶ 49.
[50] Kummer Aff., Ex. 37.
[51] Kummer Aff., Ex 35 (New Warren's First Set of RFAs to Liberty, Nos. 20 & 21).
[52] Stipulation, Ex. 21.
[53] *Id.*
[54] Stipulation, Ex. 28.

losses charged to "Warren Pumps."[55] The Premium Report for 1988 shows a loss of $2,172 charged to "Warren Pumps."[56]

G. The IMO Transaction And New Warren's Subsequent Claims History

The Pierson and Atkisson claims are the only two asbestos claims that the parties are aware of that New Warren filed before 1991. In April 1988, after those two claims had been accepted by Liberty, Imo Industries, Inc. ("IMO") bought all of the outstanding stock of New Warren (the "IMO Transaction") causing New Warren to become a wholly owned subsidiary of IMO.[57] The following year, New Warren cancelled its claims-made policy with Liberty.[58] The Stock Purchase Agreement for the IMO Transaction identified both the Pierson and Atkisson Claims and stated that an "unidentified insurer was providing New Warren with a defense in those cases."[59]

Beginning in 1991, IMO began submitting asbestos claims to Liberty on behalf of New Warren, seeking coverage under the Houdaille Policies. In its correspondence with IMO from 1991-1994, IMO referred to New Warren as "Warren Pumps/a Houdaille Division," "Warren Pumps, Inc., Division of Houidalle [sic] Pumps," and "Warren, a former division of Houdaille Industries, Inc."[60] Liberty points to IMO's description of New Warren as a former Houdaille division, which Liberty contends is false, to explain its

[55] *Id.*
[56] *Id.*
[57] O'Brien Aff. at ¶ 8.
[58] Kummer Aff., Ex. 39.
[59] Stipulation at ¶ 60
[60] Devery Aff., Ex. O.

provision of coverage for these claims, suggesting that IMO misled it into providing that coverage.

The first of the letters in the record from IMO to Liberty in which IMO references New Warren's relationship with Houdaille is dated May 30, 1991. That letter states,

> Warren Pump has recently been brought into the Mississippi Asbestos litigation actions.
>
> As the former liability and products insurer of Warren Pump, for both primary and excess coverages, accept this letter as official notice of claim on all Liberty Policy years in the insured's name Warren Pump, and/or Warren Pump division of Houdaille Industries.[61]

Within a few weeks, Liberty's claims department was investigating New Warren's connection to Houdaille.[62] That investigation involved Hank Billeter, who had been closely involved in both Houdaille's sale of Warren Pumps and the disagreement that arose between Houdaille and Liberty in 1986 over how the Houdaille Policies would respond to the liabilities that New Warren assumed in the ASA.[63] Billeter testified that he understood that "as of September 3, 1985, Warren Pumps became a separate and private company."[64]

As with many other matters in this case, the record is fairly sparse with respect to the communications between New Warren and Liberty in the 1991-94 timeframe. Liberty ultimately decided to fund the defense of the Mississippi asbestos litigation referenced in the May 30, 1991 letter under New Warren's 1985-86 claims-made policy, although the parties

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[61] Stipulation, Ex. 23.
[62] Kummer Aff., Ex. 40.
[63] Kummer Aff., Ex. 39.
[64] Deposition of Henry Billeter ("Billeter Dep.") at 152; *see also* Kummer Aff., Ex. 39 (memo from a claims specialist at Liberty reflecting the same understanding).

have stipulated that they are unaware of the basis for Liberty's decision to do so.[65] Liberty ceased to provide coverage under that claims-made policy, though, for all claims submitted to Liberty after November 3, 1991. At that point, Liberty began defending and indemnifying New Warren again under the 1985 Houdaille primary policy.

In June 1993, Liberty wrote to New Warren regarding its coverage position in another asbestos suit (the "Block Claim"). That letter states,

> There are certain questions which must be answered before we can determine whether or not this claim is covered under [t]he Houdaille Comprehensive General Liability Policy. Therefore, Liberty Mutual offers a defense, where [sic] reserving all of its rights under the policy issued to Houdaille. We have created this claim with an estimated date of accident of September 2, 1985 since this is the last available date of coverage under the Houdaille policy. (Warren Pumps was deleted as an insured under the policy effective September 3, 1985.)[66]

It is unclear what questions Liberty thought it needed answered before it could determine whether coverage was available under the Houdaille Policies. There is no communication in the record evidencing any specific inquiries. It appears, though, that some questions were indeed asked and that New Warren answered them. On October 12, 1993, New Warren wrote to Liberty saying, "[a]s to answering your other questions . . . *Warren Pumps became an independent company as a result of an l/b/o asset purchase.*[67]

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[65] Stipulation at ¶¶ 64-65. As of 1991, Liberty had no further obligations to New Warren with respect to the 1985-86 claims-made policy because that policy only covered claims brought against New Warren during the 1985-86 policy period. It clearly did not cover claims asserted in 1991. Liberty's decision to cover the 1991 claims under the 1985-86 policies is a mystery.
[66] Stipulation, Ex. 25.
[67] O'Brien Aff., Ex. 1 (emphasis added).

Liberty accepted the defense of the Block claim under the 1985 Houdaille primary policy.[68] Indeed, Liberty admits that at no time from 1987 to the present has it ever denied coverage to New Warren for any asbestos claim and that it has defended New Warren and paid out, under the Houdaille Policies, over $12 million on those claims.[69]

In recent years, Liberty has billed Houdaille for retroactive premiums and deductibles attributable to the Houdaille Policies.[70] Liberty has sent those bills to Houdaille at John Crane's Morton Grove, Illinois address.[71] In late 2005, John Crane received from Liberty Mutual invoices for retroactive premiums and deductibles that it forwarded to New Warren.[72] Those invoices have not yet been paid.

New Warren is currently a wholly-owned subsidiary of IMO. IMO itself was acquired by the Colfax Corporation in 1997.[73]

IV. Legal Standard

Typically, to prevail on a motion for summary judgment, a moving party must show that no genuine issue exists as to any material fact and that it is entitled to judgment as a matter of law.[74] The facts are viewed in the light most favorable to non-moving party.[75] With respect to cross motions for summary judgment, Court of Chancery Rule 56(h) provides:

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[68] Stipulation at ¶ 69.
[69] Stipulation at ¶ 77.
[70] Stipulation at ¶¶ 86-87.
[71] *Id.*
[72] Stipulation at ¶ 88.
[73] O'Brien Aff. at ¶ 9.
[74] *Acro Extrusion Corp. v. Cunningham,* 810 A.2d 345, 347 (Del. 2002).
[75] *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992).

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

In this case, no party has argued, in more than three hundred pages of briefing, that any issue of material fact would preclude a grant of summary judgment. Therefore, I treat the cross-motions for summary judgment as a submission for a judgment on the merits as required by Rule 56(h).[76] This treatment is consistent with the parties expressed desire to obtain a fast and efficient resolution of the Phase I issue.[77] Given the length of time that has passed since the key events surrounding this dispute occurred, even if a factual question remained, it is unlikely that a trial would yield any better answer, especially because it would involve the testimony of persons who admit to having little recollection of any of the relevant events.[78]

Most importantly, when the paper record is read in view of the deposition testimony, no issue of material fact emerges. Rather, as I describe, the record reveals that the three key parties — Houdaille, New Warren, and Liberty — resolved whatever differences they had regarding the intended practical application of the Amendment by a consistent course of conduct. That course of conduct, which has spanned nearly a

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[76] *Gildor v. Optical Solutions, Inc.*, 2006 WL 1596678, at *4 (Del. Ch. 2006); *see also Wharton v. Worldwide Dedicated Services,* 2007 WL 404770, at *1 (Del. Super. 2007) ("In the instance of cross motions for summary judgment, the parties concede the lack of disputed material facts and acknowledge adequacy of the record to support their party's respective motion.").
[77] *See generally* Transcript of May 3, 2006 Hearing.
[78] *Cf. Seaford Golf and Country Club v. E.I. DuPont de Nemours and Co.*, 2006 WL2666215, at *5 (Del. Super. 2006) (noting that summary judgment is appropriate where a trial would offer nothing additional to assist the court as trier of fact in making the decision).

generation, manifests an accord among these parties to give life to the Amendment in a workable way that preserved each of the parties' key objectives.

V. Analysis

A. The Applicable Rules Of Contract Interpretation

The ASA provides that "[t]he interpretation, validity and effect of this Agreement shall be determined in accordance with the laws of the State of New York."[79] Under New York law, "the essence of proper contract interpretation . . . is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract."[80] Determination of that intent can only be done by examining the document as a whole and "giving effect and meaning to every term of the contract."[81] That is, "[p]articular words should be considered, not as if isolated from the context, but in light of the obligation as a whole."[82] Where the terms of the contract, taken as an entirety, make the overarching intention of the parties clear, "courts examining isolated provisions should then choose the construction which will carry out the plain purpose and object of the agreement."[83]

In interpreting contract language, courts are instructed ordinarily to give the words and phrases employed their plain and commonly-accepted meaning.[84] But where a word

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[79] Devery Aff., Ex. A.
[80] *Reiss v. Fin. Performance Corp.*, 715 N.Y.S.2d 29, 34 (App. Div. 2000).
[81] *Niagara Frontier Transportation Authority v. Euro-United Corp.*, 757 N.Y.S.2d 174, 176 (App. Div. 2003).
[82] *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998) (quotations omitted).
[83] *Id.* at 567 (quotations omitted).
[84] *Laba v. Carey*, 29 N.Y.2d 302, 308 (1971).

has attained the status of a term of art and is used in a technical context, the technical meaning is preferred over the common or ordinary meaning.[85]

With regard to ambiguous contracts — i.e., those that are reasonably susceptible to two alternative interpretations — extrinsic evidence must be considered to determine the intent of the parties.[86] All relevant extrinsic evidence must be considered, including the parties' subsequent course of conduct,[87] which, in New York, is considered the most persuasive evidence of the agreed intention of the parties."[88]

B. Viking Pump's Contention That The ASA Granted New Warren Rights To Only The 1985 Policies Fails

As one of its arguments, Viking contends that the Amendment was intended only to grant New Warren access to the policies Houdaille had in effect for 1985. Viking relies on the first sentence of § 2.10, which was not altered by the Amendment, and which states, "[a] description of all of [Houdaille's] property and casualty insurance [for Warren Pumps] . . . is set forth in Exhibit 2.10(1) attached hereto and made a part hereof."[89] Exhibit 2.10(1) lists only Houdaille's insurance policies for the year 1985 and not any of the occurrence-based policies for prior years that would continue to cover claims for all occurrences attributable to those years. As a result, Viking claims that the parties must have intended only to grant rights to those listed policies. Further, Viking asserts that because the parties

[85] *E.g.*, *Madison Ave. Leasehold, LLC v. Madison Bentley Assocs. LLC*, 811 N.Y.S.2d 47, 52 (App. Div. 2006).
[86] *E.g., Chimart Assocs. v. Paul*, 489 N.E.2d 231, 233 (N.Y. 1986).
[87] *E.g.*, *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp 279, 281 (2d Cir. 1977) (citing 1 CORBIN, CONTRACTS § 101 (1964)).
[88] *Fed. Ins. Co. v. Americas Ins. Co.*, 691 N.Y.S.2d 508, 512 (App. Div. 1999) (quoting *Webster's Red Seal Publications, Inc. v. Gilberton World-Wide Publications, Inc.*, 415 N.Y.S.2d 229, 230 (App. Div. 1979)).
[89] Devery Aff., Ex. A at § 2.10.

were addressing New Warren's inability to procure only $25 million in claims-made coverage, and the 1985 policies themselves amounted to more than $70 million in coverage, the parties did not intend to grant New Warren additional rights to the hundreds of millions of dollars of coverage that all of the prior years' policies provide.

Viking's arguments fail for three reasons. First, the ASA's failure to list all of the hundreds of insurance policies that Houdaille had bought over the relevant years — policies that would remain effective to cover claims related to occurrences attributable to those years — cannot reasonably be interpreted as expressing an intent not to transfer rights to those previous years' policies. Nowhere in the text of the Amendment do the drafters refer to any particular coverage years or appear to limit temporally the grant of rights provided for therein. And if the parties intended to transfer rights to only the 1985 policies listed in the exhibit, then Houdaille breached the ASA by representing to New Warren in § 2.10 that the policies listed constituted "all of [Houdaille's] property and casualty insurance." It is difficult to imagine that the parties intended a meaning that would have put Houdaille in immediate breach, especially where another reasonable interpretation is available.[90]

Second, Viking's interpretation would cause the Amendment to fail in its expressed purpose, which was to solve New Warren's insurance problems and thus help Houdaille divest itself of tort liabilities associated with Warren Pumps. Because the listed 1985 policies would only have covered occurrences attributable that year, New Warren would have remained grossly under-insured with respect to liabilities attributable to occurrences

[90] *Cf. M. O'Neil Supply Co. v. Petroleum Heat & Power Co.*, 19 N.E.2d 676, 679 (N.Y. 1939) ("If the agreement is capable of a construction which will make it valid and enforceable, that construction will be placed upon it.").

from prior years, thwarting Houdaille's liability divestment objective. Indisputably, at the time of the transaction, the parties were concerned with liabilities for occurrences going back at least as far as 1976, as evidenced by Houdaille's insistence that New Warren's claims-made policy have a 1976 retroactive date.

Rather than intending a grant of rights to only the 1985 policies, the rest of the language of the Amendment makes clear that the parties intended to grant New Warren rights to all of the relevant years of occurrence-based coverage. When drafting the Amendment, they simply found it unnecessary to enter upon the laborious exercise of listing all of the multitudinous insurance policies that might be implicated.

Finally, for the reasons that later justify entry of summary judgment for New Warren, it is clear that neither Houdaille nor New Warren ever believed that the ASA was limited in this manner. Rather, that limitation is an interpretation advanced a generation later by a self-interested stranger to the ASA, Viking Pump.

C. The Amendment Is Ambiguous As To Whether It Grants New Warren Rights To All Of The Houdaille Policies Or Only To Houdaille's Excess Policies

To be blunt, the Amendment as a whole is a migraine-inducing read that appears to say something different every time it is considered. As stated, New Warren contends that the Amendment granted it unconditional rights to all of the Houdaille Policies to serve as excess coverage over the limits of its claims-made primary policy. Liberty contends that the Amendment granted New Warren rights only to Houdaille's excess policies and that even those rights were contingent on Liberty's granting a cut-through endorsement. For the

reasons discussed in this section, I find it impossible to conclude that the Amendment unambiguously supports either contention.

1. The Amendment's Use Of The Word "Excess"

Liberty's and Viking's position that the Amendment did not intend to grant rights to the primary policies has initial support in the sheer number of times that the word "excess" and the phrase "excess coverage insurance" appear in the Amendment. They say that the frequent use of those terms suggests that the Amendment's drafters meant to make clear that they were not granting New Warren rights to all of the Houdaille Policies and that they were liberal in their use of that term precisely to address Houdaille's supposed insistence that New Warren have no right to file claims against Houdaille's primary policies, which would have exposed Houdaille to the substantial costs associated with them.

Moreover, Liberty points out that the word "excess" is essentially a term of art in the insurance industry and can take on a special significance when used in relation to insurance matters. In an insurance context, the word "excess" often refers specifically to an excess insurance policy that can only be used once a specific primary insurance policy's limits are exhausted.[91] Indeed, the Amendment, at times, describes the rights being transferred to New Warren as rights to "excess coverage insurance." That phrase seems to describe a specific type of insurance policy and suggests that the Amendment might have used "excess" in this technical manner.

[91] *See* 1 COUCH ON INSURANCE § 1:4 (3d ed. 1995) (defining "excess insurer" as "an insurer whose coverage of a given loss is activated only after the magnitude of the loss exceeds the limits of applicable 'primary' insurance").

But it is not obvious that the Amendment intended this technical meaning. New Warren proffers an alternative interpretation, which is that the Amendment uses the word "excess" not as a term of insurance parlance, but in a descriptive sense to characterize the role that it plays in this business deal. That is, all of the Houdaille Policies were to function in excess of New Warren's contractually-mandated primary coverage, filling in to cover pre-closing losses that exceeded the limits of New Warren's claims-made policy. In other words, New Warren encourages me to read the word "excess" not as a term of art but according to its plain and ordinary meaning.

Thus, the parties pit two basic principles of contract interpretation against one another. On the one hand, courts are typically instructed to give words their ordinary and commonly understood meaning. On the other, when a word is used in a technical sense, the technical meaning prevails. Both maxims are followed in New York.[92] But those well-accepted principles give little guidance in interpreting the Amendment's use of the word "excess" because I cannot choose between the two conflicting principles until I have first determined how the word was intended to be used in the first place, and both usages are possible here.

Although it is possible to interpret the word "excess" as having a special meaning with respect to insurance matters, the Amendment does not appear to use the word in any consistent or principled manner. It does not *always* refer to the rights being transferred as "excess coverage insurance." Indeed, it sometimes seems to speak of coverage being

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[92] *Compare, e.g., Laba*, 29 N.Y.2d at 308 (ordinary meaning) *with Madison Ave. Leasehold*, 811 N.Y.S.2d at 52 (technical meaning).

granted "in excess of" New Warren's own claims-made policy limits. Such varying usage suggests a non-technical meaning because if the drafters had intended a technical usage, they would likely have used the word in the same precise manner every time. Moreover, the document being interpreted is an asset sale agreement, not an insurance policy, and was likely drafted not by insurance lawyers, but by general transactional practitioners, who would be less inclined to use the term in such a narrow manner.

Finally, the Amendment easily could have, but did not define the terms "excess" or "excess coverage insurance." I hesitate to read a technical definition into the Amendment when that definition could have been, but was not, used by its drafters.[93] It would have been very easy for the Amendment to state flat out that New Warren was not being transferred any rights to make claims against Houdaille's primary policies. But it does not. If Houdaille had been, as Liberty claims it was, so adamant that New Warren not make claims against its primary policies, one would expect to see some unambiguous statement to that effect. The use of the word "excess" does not rise to that level, given the lack of consistency and precision with which the word is employed.

2. <u>The Amendment's Three Main Passages And Their Relation To One Another</u>

Much of the difficulty in interpreting the Amendment stems from its inartful and awkward organizational structure. The key passages pop up in seemingly random fashion. If I clear out the murk, the important parts of the Amendment appear as follows:

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[93] *Cf. Flores v. Lower East Side Service Center, Inc.*, 4 N.Y.3d 363, 369 (2005) (refusing to imply a requirement into a statute where the legislature easily could have inserted it had they so intended it).

> **[1.]** [New Warren] shall insure . . . [first] through its primary insurance on a claims made basis, [second] through excess coverage insurance for losses in excess of the primary insurance limits which . . . Houdaille ha[s] in force for occurrences prior to the closing, and [third] through excess coverage insurance, which [New Warren] shall have in place effective as of the date of Closing, for occurrences on or subsequent to the date of the Closing.
>
> **[2.]** It is understood that the primary insurance limits for [New Warren's] casualty insurance will be as follows:
>
> - General Liability (including Products Liability) –
>   - Bodily injury/property damage: $1,000,000 Combined Single Limit Per Occurrence . . .
>
> **[3.]** [New Warren] . . . and Houdaille acknowledge that . . . *Houdaille ha[s] permitted [New Warren] to utilize the insurance coverage in excess of the primary casualty limits identified above*, which . . . Houdaille ha[s] in effect, for claims made pertaining to occurrences prior to the date of the Closing . . . .[94]

I have numbered each of these three passages because the order in which they appear is important. I discuss them in that order. Most of the haggling in the briefs is over the meaning of the first one. The key clause of that passage, and the one that is the most difficult to parse, states that with respect to the liability New Warren assumed for pre-closing occurrences, New Warren will insure through, "excess coverage insurance for losses in excess of the primary insurance limits which . . . Houdaille ha[s] in force." Does that clause, as New Warren contends, grant New Warren rights to use all of the Houdaille Policies once it exhausts its own primary? Or does it, as Viking and Liberty contend, grant New Warren the right to use only Houdaille's excess policies?

[94] Devery Aff. Ex. B (emphasis added).

The ambiguity stems from the fact that it is unclear whose primary insurance limits the Amendment is talking about here. The distinction is important because New Warren's claims-made primary limits did not match Houdaille's primary limits for most of the coverage years involved.[95] If the clause refers to Houdaille's primary limits, then it would grant New Warren rights to "excess coverage insurance for losses in excess of" those Houdaille primary limits — i.e., Houdaille's excess policies. This more natural reading creates a weird business dynamic, whereby New Warren would have to exhaust its own limits, then any gap between those limits and Houdaille's own primary limits, before it was able to reach the Houdaille excess layer.[96] By contrast, if the clause granted New Warren rights to use any of Houdaille's coverage in excess of New Warren's own primary limits, it would be a more awkward read. But it would make more logical business sense because it would suggest that the drafters intended all of Houdaille's insurance (including its primary layer) to serve as excess over New Warren's primary limits.

In making their arguments, Liberty and Viking point to the order of the words themselves and isolate this language: "the primary insurance limits which Houdaille ha[s] in effect." This textual ordering strongly supports their position that this clause of the Amendment is discussing Houdaille's primary limits and thus grants rights to only the

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[95] For 1985, Houdaille had a $2 million primary policy. As stated, New Warren's claims-made policy limit was $1 million. This difference is complicated by the fact that claims-made policies and occurrence-based policies operate so differently. With respect to New Warren's primary layer, only a single claims-made policy was in force at any given time. By contrast, all of Houdaille's occurrence-based policies were still available to be used.

[96] Indeed, even this awkward scenario involves ignoring the strict contractual relationship between Houdaille's primary and excess policies. The excess policy for any given year could not be reached until Houdaille's primary policy itself was used up.

excess policies. With no punctuation between "the primary insurance limits" and "which Houdaille ha[s] in effect," the latter phrase seems to describe the former.

On the other hand, New Warren claims that "which Houdaille ha[s] in force" does not refer to "the primary insurance limits," but instead describes the noun "excess coverage insurance," which it claims can fairly be read as describing all of the Houdaille Policies. New Warren looks elsewhere to give meaning to "the primary insurance limits." It points back to the first clause of this first passage, which provides that "[New Warren] shall insure [first] . . . through its primary policy on a claims made basis" and contends that "the primary insurance limits" refers to that primary policy — New Warren's own. It is possible also that the use of the generic article "the" with respect to "primary insurance limits" might suggest a reference to New Warren's claims-made policy limits simply because the Amendment is primarily about those limits. Indeed, the inadequacy of New Warren's primary limits was the driving force behind the Amendment's execution.

The problem with New Warren's interpretation, though, is that it essentially inserts two commas into the text that are not there. New Warren's reading of the language is that it will insure through "excess coverage insurance[,] for losses in excess of [its own] primary insurance limits[,] which . . . Houdaille ha[s] in force." Courts are typically chary about inserting punctuation that was not put there by its drafters,[97] and this particular insertion results in a grating and awkward sentence, even by contractual prose standards.

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[97] *See, e.g., Wirth & Hamid Fair Booking, Inc. v. Wirth*, 265 N.Y. 214, 219 (1934) (explaining that "punctuation and grammatical construction are reliable signposts in the search" for contractual intent); *but see Reliance-Grant Elevator Equipment Corp. v. Reliance Ball-Bearing Door Hanger Co.*, 205 A.D. 320, 323 (N.Y. App. Div. 1923) ("Punctuation is a most fallible

New Warren's reading does, however, have some minor linguistic appeal. Under New Warren's reading, the clause refers to *insurance* that Houdaille has in force. Under Liberty's and Viking's reading, it refers to *insurance limits* that Houdaille has in force. It makes a bit more linguistic sense to say that one has *insurance* in force than to say that one has *insurance limits* in force because the limits are essentially just descriptive of the actual insurance policy.

New Warren's better arguments involve the second and third passages I identified above. The second paragraph of the Amendment is solely devoted to outlining the new insurance that New Warren was to buy. It expressly describes the limits of New Warren's new claims-made primary policy in clear block-outline form. And immediately after identifying New Warren's claims-made primary limits, the Amendment states that "[New Warren] . . . and Houdaille acknowledge that . . . Houdaille ha[s] permitted [New Warren] to utilize the insurance coverage in excess of the primary casualty limits *identified above*, which . . . Houdaille ha[s] in effect . . . ."[98] This clause mirrors closely the structure of the clause in the first passage that spawns much of the disagreement among the parties. The one difference is that this time, the Amendment makes clear that it is talking about New Warren's primary policy limits. Those are the only "limits identified above." In fact, they are the only limits identified anywhere.

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standard by which to interpret a writing. . . . The court will take the contract by its four corners, and having ascertained . . . what its meaning is, will construe it accordingly, without regard to punctuation marks, or the want of them. . . . [T]he words control the punctuation marks, and not the punctuation marks the words.") (quotation omitted).

[98] Devery Aff., Ex. B.

A consistent reading of the whole Amendment would then give substantial support New Warren's position, notwithstanding the fact that New Warren's reading of the first passage twists that language to the outer bounds of any rational interpretation.[99] The third passage is clearly talking about Houdaille "hav[ing] permitted" New Warren to use its insurance in excess of New Warren's own primary limits. And it does not speak in terms of "excess coverage insurance" here, but rather suggests that Houdaille "ha[s] permitted" New Warren to use all of its insurance policies. Thus, with the commas inserted in paragraph one as New Warren suggests, paragraphs one and three of the Amendment would set up a system whereby New Warren's insurance needs were covered in these two logical ways: (1) for claims relating to the period before the closing, New Warren would address its needs through its new primary policy and after its own primary limits were exceeded, through any relevant insurance Houdaille had in force in excess of those limits; (2) for claims relating to period after the closing, New Warren would go to its primary policy and, after its limits were exhausted, to the new excess coverage it was to purchase for those non-Houdaille related claims.

3. <u>The Amendment's Treatment Of The Deductibles And Retroactive Premiums</u>

New Warren contends that the Amendment addressed Houdaille's concerns over the costs for deductibles and retroactive premiums associated with its primary policies in the provision that requires New Warren to reimburse Houdaille for all costs related to New Warren's use of the Houdaille Policies. If the Amendment does in fact speak to costs for

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[99] *See Kass*, 91 N.Y.2d at 566 (explaining that courts examining isolated contract provisions should read those provisions in light of the contract as a whole and interpret them in a manner consistent with the rest of the agreement).

deductibles and retroactive premiums, that would support New Warren's position that the Amendment granted it rights to all of the Houdaille Policies, including the primary policies. If there was no grant of rights to the primary policies, there would have been no need for Houdaille to bargain for New Warren to reimburse it for the costs associated with them. As stated, the excess policies did not have the same loss-sensitive features. That relevant contract language states:

> It is further agreed that [New Warren] shall reimburse . . . Houdaille for any out-of-pocket costs (including, without limitation, reasonable attorneys' fees and disbursements) which . . . Houdaille may incur in connection with filing claims and recovering payment under . . . Houdaille's insurance coverages with respect to claims asserted after the date of the Closing.[100]

Liberty contends that this provision merely addresses potential ordinary attorneys' fees and administrative costs associated with New Warren's use of the excess policies. That is a plausible, if somewhat cramped, reading of the key language, which is "out-of-pocket costs." That term would seem easily to include deductibles and retroactive premium payments. And other than the costs for deductibles and retroactive premiums, Liberty has not identified any, and it is difficult to imagine what other "out-of-pocket costs" would be involved in New Warren's use of the Houdaille Policies.[101]

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[100] Devery Aff., Ex. B. The use of the plural phrase "insurance coverages" here is worth mentioning because it suggests that rights to multiple types of insurance policies (perhaps both primary and excess) had been granted to New Warren. Moreover, this provision fails to use the phrase "excess coverage insurance," as it does elsewhere, suggesting that this provision of the Amendment is dealing with the costs associated with Houdaille's primary policies.

[101] These costs would also fit comfortably within the definition of the term "disbursements," one of the examples the Amendment uses to help describe "out-of-pocket costs." "Disbursements" is defined as "[t]he act of paying out money, *commonly from a fund or in settlement of a debt or account payable*." BLACK'S LAW DICTIONARY 495 (8th ed. 2004) (emphasis added). A payment in settlement of a debt or account payable would seem to closely resemble a substantial and

Under New Warren's interpretation, in which it agreed to reimburse Houdaille for the deductibles and retroactive premiums, Houdaille would not have given up much of anything at all by letting New Warren use its primary policies. At the same time, Houdaille would have achieved a complete solution to the insurance problems of New Warren that threatened to crater the Warren Pumps transaction. New Warren's interpretation is therefore attractive for the reason that it represents a rational and logical business solution in which all of Houdaille's concerns about the transfer of liabilities and the deductibles and retroactive premiums were addressed, while still preserving its ability to collect the $35 million purchase price and put substantial liabilities in its rear-view mirror. Even if Houdaille had hoped New Warren would be able to obtain access to Houdaille's excess policies directly after exhausting its own claims-made primary limits, which, as I discuss below, appears to have been a plausible expectation, it is reasonable to read this provision in the Amendment as reflecting Houdaille's having bargained for the right to be reimbursed for the costs associated with New Warren's use of the primary policies if New Warren had to resort to them first.

4. <u>The Amendment's Treatment Of The Cut-Through Endorsement Contingency</u>

Liberty's position that the Amendment granted only a conditional right to use the Houdaille Policies, dependent on a cut-through endorsement finds support in the fact that the Amendment provided that New Warren could use Houdaille's insurance "only to the extent that such insurance coverage is in fact available," and that "Houdaille shall have no

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substantive expense like a deductible or retroactive premium payment, but would only very awkwardly describe ordinary administrative costs for things like envelopes and paper clips, as Liberty contends it does.

liability to [New Warren] . . . if, for any reason, such excess insurance coverage is not available or not otherwise effective as to any party, including, without limitation, [New Warren]."[102] This language is reasonably read as suggesting that the parties acknowledged that Liberty may not yet have consented to the solution that the parties arrived at, and that New Warren was taking the risk that Liberty would not so agree and that Liberty might thereby frustrate the arrangement.

But, the cut-through endorsement contingency that Liberty reads into the Amendment is a big contingency that one would expect to be explicitly mentioned. New Warren's heavily-lawyered lenders were threatening to deny funding for the deal unless New Warren's insurance problems were addressed. The meaning Liberty ascribes to the Amendment, which conditions a grant of rights to Houdaille's excess policies on Liberty's execution of a cut-through endorsement, would have likely provided little comfort for New Warren's lenders, or their attorneys, because the solution the parties arrived at would have been subject to Liberty's whim. One would expect the parties to have made some explicit reference to a cut-through endorsement contingency if the rights were in fact intended to be so contingent.

In the end, I find it impossible to conclude that the text of the ASA and the Amendment unambiguously reflects either of the dueling positions. Therefore, parol evidence should properly be considered. I now delve deeper into the business objectives of each of the parties, which I do for two reasons. First, I discuss what light this evidence sheds on the likely intent of the parties to the Amendment. Second, I explain why, in light

[102] *Id.*

of those business realities, Liberty's conduct in the years following the Warren Pumps transaction prevents it from now exercising rights under the Houdaille Policies' anti-assignment clauses.

D. The Evidence Regarding The Negotiation Of The Amendment Suggests A Concrete Business Problem And An Unconditional Solution

The failure of the parties to nail down the specifics of the Amendment more clearly becomes more understandable once the relationships among the parties are considered. As to Liberty, it wanted to continue insuring Houdaille, and it got a new client in New Warren out of the deal. As to Houdaille and New Warren, they sought a workable solution to New Warren's inability to buy adequate claims-made insurance that would satisfy New Warren's lenders and facilitate Houdaille's divestment of Warren Pumps's liabilities. The arrangement Houdaille and New Warren worked out, although having different implications depending on interpretation, achieved those goals and did not stand to require Liberty to defend claims it had not already promised to insure.

It appears that at the time the parties executed the Amendment, Houdaille expected that New Warren would be able to go right to Houdaille's excess policies after it exhausted its own primary policy. Houdaille believed that Liberty had already agreed to that,[103] which would have been a reasonable thing for Liberty to do given that Liberty was getting to write several new primary policies for the all of the buyers of the various Houdaille businesses. Although Houdaille had failed to lock up Liberty in its agreement to that arrangement, there is no evidence that any uncertainty over the primary versus excess issue was ever

[103] *See* Devery Aff. Ex. P.

communicated to New Warren. Indeed, none of the testimony, drafts, or correspondence between Houdaille and New Warren makes any distinction between Houdaille's primary and excess policies. Moreover, New Warren was not so much concerned with which policies it would get to use, but with the fact that it would be covered at all.

Houdaille may have left the Amendment intentionally vague precisely because Liberty had not yet given the cut-through endorsement and because Houdaille did not know exactly how the arrangement would work in practice. Although Houdaille expected Liberty to give the cut-through endorsement, perhaps it had enough uncertainty about whether New Warren would be able to go right to Houdaille's excess policies, or whether New Warren would have to go to Houdaille's primary policies first, so as to purposely draft the Amendment so it could be read either way. What is clear, though, is that Houdaille and New Warren intended for New Warren to be insured.

Importantly, the fact that Houdaille believed Liberty had agreed to execute a cut-through endorsement does nothing to further Liberty's contention that the Amendment's grant of rights was intended to be contingent on the endorsement. As stated, there is no evidence that the cut-through endorsement was ever discussed with New Warren. But more importantly, the contingency that Liberty reads into the Amendment is inconsistent with the landscape surrounding the Amendment's negotiation. The fact that Houdaille may have hoped, or even expected, that New Warren would not have to first go through the primary policies that provided for deductibles and retroactive premiums does not mean that Houdaille did not intend for New Warren to be able to obtain access to those primary policies if that was the only way for New Warren to be adequately insured. Although the

loss-sensitive features of Houdaille's primary policies were a factor in the parties' original agreement requiring New Warren to buy $25 million of claims-made coverage for the pre-closing occurrences, Liberty has presented no evidence that those features were an important sticking point when the realities of the insurance market prevented the original arrangement from working.

Houdaille's agreement to allow New Warren to use the insurance coverage that was already in place for Warren Pumps's liabilities, including Houdaille's primary policies, if that was the only option, makes economic sense from Houdaille's perspective. As a matter of tort law, notwithstanding any contractual arrangement it had made with New Warren, Houdaille remained liable for the harm caused by the asbestos-containing products manufactured by Warren Pumps during the Houdaille era. Houdaille wanted to rid itself of those liabilities in order to simplify its balance sheet and proceed with the divestiture of the rest of its businesses in a predictable manner. The only way for Houdaille to do that was to convince plaintiffs that there was no need to sue Houdaille because New Warren had agreed to assume the liability and stood able to pay the claim. If New Warren, which was thinly-capitalized and highly-leveraged, did not have adequate insurance, plaintiffs would continue to sue Houdaille.

In this regard, the Amendment was less attractive to Houdaille than the original solution requiring New Warren to get $25 million in new coverage. But by promising New Warren a right to use its existing policies, Houdaille was able to facilitate the sale's consummation and put Warren Pumps's liabilities in the past, with the only cost being permitting New Warren to use insurance policies that were already in existence. For New

Warren, the solution obviously satisfied its lenders and gave it assurance that substantial insurance existed to cover the Houdaille-era claims it was assuming.

E. The Post-Closing Conduct Of The Parties Confirms The Unconditional Solution To New Warren's Insurance Problems And Liberty's Manifestation Of Assent To It

Many of the issues that the parties bat back and forth in their briefs with respect to which insurance policies Houdaille intended to allow New Warren to use are the same issues that Houdaille discussed with Liberty in the first few years following the closing of the Warren Pumps transaction. That is, the dispute that the parties have brought before this court about New Warren's rights under the Houdaille policies was resolved in the late 1980's and was implemented in practice for a generation.

In 1986-87, Houdaille engaged in a substantial give and take with Liberty about how the Houdaille Policies would respond to Warren Pumps's Houdaille-era liabilities and whether the claims would cut directly through to the excess policies or whether the Houdaille primary policies would have to respond first. As discussed previously, Houdaille's insurance broker at Marsh & McLennan expressed surprise that Liberty was taking the position that New Warren could not utilize Houdaille's excess policies after exhausting its own primary policy but instead had to incur the expense of first using Houdaille's primary layer. He expressed regret about the Amendment, indicating that Houdaille and New Warren would have proceeded differently had they known that Liberty would insist that New Warren use Houdaille's primary policies before gaining access to Houdaille's excess layer.[104]

[104] *See* Buckley Aff., Ex. 1.

The relatively narrow dispute that arose actually illustrates the larger congruence of interests among Houdaille, Liberty, and New Warren. Importantly, the key issue was therefore not whether New Warren was covered at all under the Houdaille Policies, but whether New Warren had to seek coverage first under Houdaille's primary policies before making claims against Houdaille's excess. Liberty (as insurer) wanted New Warren to have to use the primary policies first because such use would entitle Liberty to deductibles and additional retroactive premiums. Houdaille (as a major client of Liberty) preferred to have New Warren go straight to the excess policies to avoid having to rely on its contract right to recoup those costs from New Warren, an entity that was highly leveraged and presumably presented a substantial amount of credit risk. Permeating this issue (and the similar issue involving the subsidiaries sold to Stanwich) was Houdaille's desire to ensure that it would not face claims relating to the sold businesses. If insurance was not available to New Warren to address those claims, plaintiffs would sue Houdaille too.

The notable fact with regard to the disagreement that arose between Houdaille and Liberty is that there is no evidence in the record that Houdaille ever informed New Warren of Liberty's refusal to issue a cut-through endorsement. Houdaille treated Liberty's obstinacy as its problem, not New Warren's. Equally important is the fact that neither Liberty nor Marsh & McLennan contacted New Warren about any of the post-closing insurance issues that arose either. Marsh & McLennan's Ron Morrison was involved both in the solution arrived at in the Amendment and in selling New Warren its primary claims-made policy. Although Houdaille was likely Morrison's more important client, he also represented New Warren. Upon learning Liberty's position, one would expect that, if

Morrison had thought Houdaille was not going to let New Warren use Houdaille's primary policies, or that Liberty was objecting to that arrangement, he would have contacted New Warren to let New Warren know that important fact about the status of its insurance coverage, or lack thereof. One would think he would have had an ethical obligation to do that given that he was the broker who set the arrangement up in the first place. The fact that Morrison did not contact New Warren is persuasive evidence that he understood that although New Warren would not be allowed to cut through to Houdaille's excess layer, New Warren would be able to obtain access to Houdaille's primary policies if New Warren's own claims-made coverage proved inadequate.

As far as I can tell from the record, when Liberty put an asbestos exclusion into New Warren's claims-made policy in 1987, no red flags went up at New Warren. The asbestos exclusion was important because it changed the issue from where New Warren would look for insurance after it exhausted its own claims-made limits to where New Warren would look for coverage for asbestos claims related to Houdaille-era occurrences in the first instance. The generation-spanning record does not indicate clearly why this complication was resolved the way it was. But we know the more important thing: how it was resolved, which is that Houdaille and Liberty permitted New Warren to submit those asbestos claims to Houdaille's primary policies. New Warren has consistently done that, to the tune of over $12 million, for the last twenty years.

Based on that undisputed history, it is clear that at some point, the parties reached an agreement, under which New Warren, instead of Houdaille, would present claims to Liberty related to the asbestos-containing products manufactured by Warren Pumps during the

Houdaille era. As to Houdaille, this understanding is manifested in its failure to object to New Warren's heavy use of the primary policies.[105] Either Houdaille understood that it had originally granted New Warren such a right in the Amendment, or it decided after the fact that such an arrangement was the most advantageous to it given the circumstances, possibly because it had previously led New Warren to believe that it had obtained the necessary agreement from Liberty to allow New Warren to cut through to Houdaille's excess policies if New Warren's new claims-made policies were unable to meet the need. Either way, Houdaille understood that New Warren had the right to use its insurance coverage.

As to Liberty, its assent to that arrangement is manifested by its consistent provision of coverage under terms that reflect its negotiating position with Houdaille in 1986 and 1987. In blunt words, *Liberty won that negotiation* and thereby secured the right to continue to collect deductibles and retroactive premiums under Houdaille's primary policies.

An examination of the circumstances under which Liberty prevailed and began to provide that coverage helps explain the reasons why it must continue to treat New Warren as an insured under the Houdaille Policies. In May 1986, Houdaille wrote to Liberty asking for streamlined instructions with respect to claims handling that would allow both Houdaille and the various buyers, including New Warren, to "keep their interests protected."[106] In response, Liberty involved its in-house attorneys in an effort to determine what its

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[105] I reject Liberty's speculation that Houdaille was unaware of the fact that New Warren was filing claims against, and obtaining coverage under, the primary policies. That conjecture is refuted by the fact that the Premium Report provided to Houdaille in 1988 shows a $2,172 loss charged to "Warren Pumps." *See* Stipulation, Ex. 28.

[106] Stipulation, Ex. 2.

obligations were to Houdaille and the buyers of the various subsidiaries. Liberty's lawyers were not particularly helpful in this regard, primarily because the contract language involved was susceptible to varying interpretations. Nonetheless, Liberty had all of the information it needed in order to make an informed decision about how it would respond to Warren Pumps's Houdaille-era asbestos liabilities in light of the ambiguous contract entered into between Houdaille and New Warren. Liberty had reviewed the ASA and knew that the Warren Pumps transaction took the form of an asset sale. Moreover, Liberty understood that Houdaille did not intend to forfeit the valuable occurrence-based insurance coverage that it had purchased over the years, but rather it intended that such coverage would be utilized either by itself or by the buyers of the businesses it was selling. At the same time, Liberty's lawyers represented to it that "Houdaille [was] absolved of liability and won't be utilizing its coverage."[107]

Against that backdrop, Liberty opted to take a wait-and-see approach and not to give Houdaille any hard answers about how the Houdaille Policies would respond for New Warren, despite Houdaille's explicit request for Liberty to state its position. When New Warren eventually filed an asbestos claim in 1987 and it came time for Liberty to take a definite position, Liberty prevailed in its refusal to allow claims to go directly to the excess policies. But it stopped well short of refusing to provide any coverage to New Warren at all.

Important also is the fact that during the back-and-forth between Houdaille and Liberty over the insurance issues raised by the Houdaille Divestment, Liberty failed to consider the form of the various transactions to be an important consideration in deciding its

[107] Stipulation, Ex. 7.

position. Houdaille specifically asked Liberty to clarify Liberty's position on how the Houdaille Policies would respond with respect to both the Stanwich Transaction (a stock sale) and the Warren Pumps transaction (an asset sale). Liberty had both the Warren ASA and the Stanwich Stock Purchase Agreement available to it and was aware of the differences between those transactions. But Hank Billeter's September 2, 1986 memo specifically and conveniently refers to Warren and Stanwich as presenting two "similar coverage situations." And this is despite the fact that its own in-house attorneys explicitly warned that the form of the particular transactions had a direct bearing on the post-closing liabilities of the parties.

Liberty has now, of course, done a complete 180° turn, taking the position that the difference in form between the Warren asset sale and the Viking stock sale, and the technical legal differences in the law's treatment of those transactions, makes all the difference in the world with respect to the two companies' rights to coverage. According to Liberty, Viking is covered because its corporate identity never changed. Because the Warren Pumps transaction was an asset sale and not a stock sale or a merger, New Warren is out of luck.

Liberty's decision to emphasize the transaction's form now, when it clearly did not in the past, puts it in a graceless litigation posture. In 1986 when Houdaille raised the issue of how the Houdaille Policies would respond to the liabilities that New Warren assumed, Liberty could have treated the Warren asset sale differently than the other stock sales, could have stood on its contractual anti-assignment rights, and thus could have denied coverage under the Houdaille Policies to New Warren when New Warren sought that coverage. But

there likely would have been real-world consequences to that decision. The Houdaille Divestment gave Liberty the opportunity to write several additional policies, including the New Warren claims-made policy that covered, in part, claims that Liberty had already been paid to cover in the Houdaille Policies. That situation was arguably a win-win for Liberty. It got to collect additional premiums for the claims-made policies, and, by refusing to allow New Warren to obtain access to the excess policies directly, got the opportunity to continue to collect deductibles and retroactive premiums under the Houdaille primary policies.

In sum, after Liberty had inserted an asbestos exclusion into New Warren's claims-made policy, Liberty extracted whatever concessions its negotiating leverage could pry free by requiring New Warren to seek coverage first under Houdaille's primary policies and thus denying both Houdaille and New Warren the advantages of a cut-through endorsement. Given the business relationships between Liberty and both Houdaille and New Warren, and Liberty's rational desire to keep those relationships on good terms, Liberty was in no position to raise an anti-assignment objection and completely invalidate the insurance arrangement that Houdaille and New Warren believed they had worked out, especially when that position would have been based on a legal technicality (i.e., the law's different treatment of asset and stock sales). After all, the contractual agreement between Houdaille and New Warren did not expose Liberty to any additional liability that it had not already promised to cover. Not only that, Liberty was hardly a stranger to the process leading to the ASA and the Amendment. Liberty knew about the negotiations before the Amendment was finalized, was involved in discussions with Houdaille about how to resolve the insurance

issues, had at the very least confused its clients about its position on coverage, and got new insurance business out of the result.

And even if Liberty had stood on its contractual anti-assignment rights, it still likely would not have gotten off the hook for the asbestos claims that underlie this controversy. Given that Houdaille would likely have faced Warren Pumps-related asbestos suits itself if New Warren were not insured, Liberty was not it any position to achieve a *Fantasy Island*-style total windfall. Houdaille would have used the policies itself in that scenario. If Liberty had refused New Warren coverage in 1986 or 1987, that might have prompted Houdaille and New Warren to work out a deal whereby Houdaille would have retained the liabilities that Liberty had promised to cover, but only to the extent that coverage was actually in place. The parties could then still have provided for New Warren to indemnify Houdaille for the deductibles and retroactive premium costs associated with that insurance coverage. From Houdaille's and New Warren's perspectives, the result would not have been much different. Liberty was never going to get to walk away entirely.

Today, it would be virtually impossible to work out a similar solution because any such arrangement would have to be between New Warren and John Crane, the current "owner" of the Houdaille Policies. The difficulty of working out that deal stems from the facts that (1) John Crane's rights to the Policies, themselves, would presumably depend on another apparently unconsented-to assignment (the assignment from Houdaille to John

Crane)[108]; and (2) Liberty would probably refuse to assent now, simply to avoid being attacked on yet another ground by Viking.

Finally, various corporate transactions over the past two decades have further complicated things. The parties have changed positions in important ways during the twenty years since Liberty granted New Warren the right to use the Houdaille Policies. IMO bought all of the stock of New Warren after the first asbestos suits had already been brought against New Warren. The IMO Stock Purchase Agreement specifically stated that the Pierson and Atkisson claims were being covered. At the time of that transaction, all of the parties likely assumed, based on Liberty's conduct, that insurance coverage for New Warren's asbestos liability remained in place. To allow Liberty to deny that coverage now would frustrate IMO's reasonable expectations regarding that coverage. It would likely also frustrate Colfax Corporation's reasonable expectations as to insurance when it bought IMO in 1997.

All legal roads lead to the conclusion that New Warren has the full rights of a named insured under all of the Houdaille Policies. Put simply, whatever ambiguity existed in the Amendment was resolved by mutual agreement of Houdaille, New Warren, and Liberty. That resolution, reflected in an unbroken course of conduct ever since, is the best evidence of the Amendment's intended meaning.[109] As important, the original meaning of the Amendment was rendered irrelevant by the later agreement among Houdaille, New Warren,

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[108] *See* Stipulation at ¶ 87 (reflecting the fact that Liberty continues to address its bills for deductibles and retroactive premiums to "Houdaille" and not to John Crane).

[109] *E.g., Fed. Ins. Co.,* 691 N.Y.S.2d at 512 (noting that the parties' post-contracting course of dealing is the most persuasive evidence of contractual intent).

and Liberty about how Houdaille-era asbestos claims against New Warren would be handled. When the parties addressed real-world claims and the consequences of the asbestos exclusion Liberty inserted into New Warren's primary policies, their agreed course of action was unambiguous: New Warren could utilize Houdaille's coverage starting at the primary layer. Notably, this agreement seems to have been a larger one encompassing other aspects of the Houdaille Divestment, including the Stanwich transaction. This later agreement binds Houdaille, New Warren, and Liberty either as a novation in which the parties agreed, with Liberty's full consent, to substitute New Warren in place of Houdaille as the insured for Warren Pumps's liabilities, or as a new and separate contract.[110]

Each of the parties engaged in a give and take, including New Warren, which had to use Houdaille's more expensive primary layer, as Liberty successfully demanded, rather than go directly to Houdaille's excess, as Houdaille and New Warren would have preferred. Liberty accepted for itself the benefits of that arrangement, which flowed both from the fact that it would collect deductibles and retroactive premiums from New Warren's use of Houdaille's primary layer and from the larger relationship it had with Houdaille in the circumstances of the divestiture of the rest of the Houdaille businesses. Liberty got much, if

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[110] *See* Restatement (Second) of Contracts § 280 ("A novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty"); *see also Eastway Const. Corp. v. New York Property Underwriting Ass'n*, 382 N.Y.S.2d 949, 951 (N.Y. City Civ. Ct. 1976) (noting the effectiveness of a novation to add or substitute a new insured under an existing insurance policy). As I discuss more fully later, Liberty is bound by its agreement to treat New Warren as an insured under the Houdaille Policies notwithstanding its failure to execute any formal documents memorializing this agreement. "A party's knowledge of and consent to a novation need not be express but may be implied from his or her conduct or from the surrounding circumstances." 30 WILLISTON ON CONTRACTS § 76:14 (4th ed. 2004); *see also Schloss Bros. & Co. v. Bennett*, 260 N.Y. 243, 248 (1932) (stating that consent to enter into a new or substituted contract may be implied by conduct).

not all, of the new insurance business that arose out of the Houdaille Divestment. Liberty cannot equitably re-trade a long-standing deal, much less one in which it was the winner.[111] Moreover, as described, a generation has passed and a variety of parties, including New Warren's present owners have changed position in reliance on this long-settled course of dealing. That reliance also precludes Liberty from upsetting the status quo now.[112]

F. Liberty's Additional Arguments

In the remainder of this opinion, I address and reject three additional arguments that Liberty makes to try to avoid the consequences of its twenty-year course of conduct. Those arguments are that: (1) the non-waiver provisions in the Houdaille Policies allow it to continue to assert its contractual anti-assignment rights; (2) Liberty purported to extend all of the coverage it granted to New Warren under a general reservation of rights; and (3) New Warren represented itself to Liberty as a former Houdaille division, which caused Liberty to provide coverage under the mistaken belief that New Warren was a named insured on the Houdaille Policies.[113]

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[111] *See, e.g., La Vere v. R.M. Burnitt Motors, Inc.*, 446 N.Y.S.2d 851, 852 (N.Y. City Civ. Ct. 1982) ("The court will not rewrite a contract freely entered into by the two parties — even if the contract may be grossly . . . unfavorable to either party."); *accord Schmelzel v. Schmelzel*, 287 N.Y. 21, 26 (1941).

[112] A material change of position in reasonable reliance on an insurer's provision of coverage estops the insurer from later denying that coverage. *E.g. O'Dowd v. American Sur. Co. of New York*, 3 N.Y.2d 347, 355 (1957). Moreover, Liberty's extreme twenty-year delay in attempting to deny New Warren coverage under the Houdaille Policies is unreasonable by all measures. That inexcusable delay coupled with the actual prejudice suffered by New Warren and its current owners entitle New Warren to a defense of laches against Liberty's attempts to deny coverage now. *McGuiness v. John P. Picone, Inc.*, 36 A.D.3d 1032, 1032 (N.Y. App. Div. 2007).

[113] Analysis of these issues implicates another minor complexity in this case, which is that it is unclear, and the parties have neither briefed nor taken positions on, which state's law applies to the interpretation of Liberty's rights under the Houdaille Policies. Delaware courts analyze choice of law questions involving insurance policies under Restatement (Second) Conflicts of

1. Liberty Is Not Protected By The Non-Waiver Clauses

Each of the Houdaille Policies contains a non-waiver clause that provides,

> Notice to any agent or knowledge possessed by any agent . . . shall not effect a waiver or a change in any part of this policy or estop the company from asserting any rights under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.[114]

Liberty contends that because it neither executed a policy endorsement consenting to the transfer nor formally released its right to demand that all policy changes be made by written endorsement, its rights under the anti-assignment clauses remain unimpaired.

Non-waiver clauses serve an important purpose in contract law, which is generally to ensure that a party to a contract is given an opportunity to make a thoughtful and informed decision about whether or not to enforce a particular contract right. They give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term during the hectic course of day-to-day business will not result in a complete and

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Law § 188, which weighs various factors, including the place of contracting, the place of negotiation, the place of performance, the location and subject matter of the contract and the place of incorporation and place of business of the contracting parties. *See, e.g., Oliver B. Cannon & Son, v. Dorr-Oliver, Inc.,* 394 A.2d 1160, 1166 (Del. 1978). The parties to this action seem to agree that these factors most likely point to either Massachusetts (the location of Liberty's headquarters and of the Warren manufacturing plant), New York (the location of Houdaille's headquarters during the early and mid-70's and the office that sold the policies), or Florida (the location of Houdaille's headquarters during the late 70's and 80's). The parties have also generally taken the position that, with respect to the issues involved, there is no substantial conflict among the laws of these three jurisdictions, making a choice of law analysis unnecessary. *See*, *e.g.*, December Argument Tr. at 51-52. My analysis of Liberty's rights under the Houdaille Policies implicates settled rules of contract law and general equitable principles that do not materially differ among jurisdictions. As a result, I, like the parties to this action, need not answer the choice of law question, nor need I differentiate between the various policy years with respect to my analysis.

[114] Kummer Aff., Ex. 4.

unintended loss of its contract rights if it later decides that strict performance is desirable. Moreover, with regard to commercial contracts entered into between legal entities that can only act through authorized agents, they ensure that a contracting party will not lose its rights due to spontaneous words and acts of corporate agents. In this sense, non-waiver clauses serve to inform the other contracting party that no individual agent has the authority to waive or alter contract terms. Rather, they make clear that some official act is required in order to actually change the original agreement. Ordinarily, that official action is a signed writing modifying the contract.

The non-waiver clauses in the Houdaille Policies speak directly to this concern in the sense that the parties to the insurance policies agreed that "notice to . . . or knowledge possessed by any agent"[115] would not affect Liberty's rights under the policies. In other words, no individual employee at Liberty had the ability or authority to alter those rights. Rather, the policies contemplated that any modification would require official action on behalf of Liberty in the form of a policy endorsement.

But, while recognizing those important considerations, the law is clear that non-waiver clauses are not iron-clad protections that preclude courts from holding insurers responsible for their post-contracting behavior. As the Florida Supreme Court has put it, "such agreements do not have the unfettered power in all circumstances to supersede the doctrines of waiver and estoppel."[116] New York and Massachusetts law agrees.[117] All of

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[115] *Id.*

[116] *Tiedke v. Fidelity & Cas. Co. of New York*, 222 So.2d 206, 210 (Fla. 1969); *see also* 46 C.J.S. *Insurance* § 849 ("A non-waiver agreement, whether contained in the policy or existing separately, may be waived itself by express agreement or by acts or conduct."); 13 WILLISTON ON CONTRACTS

the jurisdictions whose law might apply strictly construe non-waiver provisions in favor of insureds and ordinarily hold that an authoritative act, such as the affirmative provision of coverage, done with full knowledge of the relevant facts, does not fall within the protection of a non-waiver clause.[118]

During the 1986-87 back and forth between Liberty and Houdaille, several individuals, including Liberty's in-house attorneys, were involved in Liberty's consideration of how the Houdaille Policies would respond to the liabilities that New Warren assumed. Liberty provided coverage after a cautious and collective decision making process. In the 1991-94 timeframe, Liberty again investigated New Warren's corporate history and provided coverage based on accurate information it received from New Warren. Those authoritative decisions to provide coverage distinguish this case from those that, in light of a non-waiver clause, allow an insurer the continued ability to enforce all of its contract rights. The important difference is that Liberty's rights here were not altered by knowledge of, or notice to, or even the unilateral acts of, a single agent, but from the company's collective and informed decision to provide asbestos coverage to New Warren under the Houdaille Policies for a period of nearly twenty years. Moreover, this is not a case of an alleged oral

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§ 39:36 (4th ed. 2000) ("The general rule that a party to a written contract may waive a provision of that contract impliedly by conduct despite existence of an anti-waiver . . . clause, is based on the view that the nonwaiver clause itself, like any other term of the contract is subject to waiver by agreement or conduct during performance.").

[117] *E.g., Lee v. Wright*, 108 A.D.2d 678, 680 (N.Y. App. Div. 1985) ("[I]t has long been the rule that parties may waive a 'no-waiver' clause."); *M.J.G. Properties, Inc. v. Hurley*, 537 N.E.2d 165, 167 (Mass. App. Ct. 1989) (holding that a non-waiver clause does not preclude a finding of waiver).

[118] 13 COUCH ON INSURANCE § 194:34 (3d ed. 2005). Thus, for example, an insurer under a liability policy ordinarily waives a policy defense of untimely notice of claim, notwithstanding a non-waiver agreement, by hiring counsel to negotiate with an injured party and appear in court on behalf of the insured. *Transamerica Ins. Group v. Beem*, 652 F.2d 663, 666 (6th Cir. 1981).

modification or waiver. Rather, there are likely thousands of writings evidencing Liberty's decision to provide asbestos coverage to New Warren.[119] Liberty's failure to execute a formal policy endorsement consenting to a transfer of rights is therefore immaterial here.

2. Liberty's General Reservation Of Rights Was Ineffective

It is hornbook law that an insurer bears a duty "to inform its insureds of claims decisions, and to do so in a reasonably prompt and informative manner that allows insureds to protect their rights by pursuing other course[s] of action."[120] When an insurer fails to provide a timely disclaimer of liability, it cannot later deny that liability.[121] With these principles in mind, Liberty's reliance on its general reservation of rights is misplaced for several reasons. Initially, Liberty did not reserve any rights with respect to the first asbestos claim that it covered for New Warren. On that basis alone, Liberty could be held to have waived its right to later raise an anti-assignment objection.[122]

But regardless of that arguable oversight, the law places an outer time limit on the effectiveness of a general reservation of rights. When an insurer agrees to defend a claim on the condition that it reserves the right to disclaim liability at a later date, if the insurer intends to stand on a particular reservation, it must inform the insured as soon as practicable after it has ascertained facts upon which it bases its reservation.[123] If it does not, it cannot

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[119] Several have been submitted with these cross-motions. *See*, *e.g.*, Stipulation, Ex. 25.

[120] 14 COUCH ON INSURANCE § 198:31 (3d ed. 2005).

[121] *E.g., New York Funeral Chapels, Inc. v. Globe Indem. Co.*, 33 F. Supp. 2d 294 (S.D.N.Y. 1999); *Brown v. State Farm Mut. Auto. Cas. Ins. Co.,* 506 F.2d 976 (5th Cir. 1975); *see also* 14 COUCH ON INSURANCE § 198:31 (3d ed. 2005).

[122] *E.g.*, *Sargent v. Allstate Ins. Co.*, 165 Ga. App. 863, 867 (1983) (explaining that a general reservation of rights is ineffective to prevent a waiver that has already occurred).

[123] *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 1988 WL 877629, at *5 (D.D.C. 1988) (citing *Tiedke*, 222 So.2d at 209).

disclaim liability in the future.[124] Liberty had all of the information it needed in order to analyze its coverage obligations to New Warren when it first reviewed the Amendment. That was 1986 at the latest. In 1993, when the freshness of that information had perhaps waned, New Warren again specifically told Liberty that it became independent from Houdaille "as a result of an l/b/o asset purchase."[125]

Finally, regardless of the timing of Liberty's objection, in the circumstances of this case, the content of Liberty's reservation of rights was ineffective to reserve the particular rights it is now asserting. A reservation of rights given by an insurance company "will be held sufficient only if it fairly informs the insured of the insurer's position."[126] Thus, ordinarily, when an insurer states grounds for potentially disclaiming liability, it waives all other possible grounds for disclaimer.[127] Each of the reservation of rights letters that Liberty submitted in this case stated in general terms that there were certain questions that must be answered before Liberty could determine whether or not New Warren's claims were covered under the Houdaille Policies and that Liberty was reserving all of its rights on

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[124] *Id.* Thus, for example, in *Tiedke,* 222 So.2d at 210, a liability insurer was precluded from raising a specific coverage defense after an adverse judgment had been returned where it had begun defending under a general reservation of rights a year and four months earlier. Florida statutes and New York insurance regulations also require an insurer to provide specific reasons for asserting coverage defenses within a specified period of time. *See* Fla. Stat. § 627.426(2) ("A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless . . . [w]ithin 30 days after [it] knew or should have known of the coverage defense, written notice of reservation of rights to assert [it] is given."); 11 N.Y.C.R.R. § 216.6 (providing strict guidelines for giving notice of coverage defenses and stating, "[t]he company shall inform the claimant in writing as soon as it is determined that there was no policy in force or that it is disclaiming liability because of a breach of policy provisions by the policyholder [and the company shall] explain its specific reasons for disclaiming coverage").

[125] O'Brien Aff., Ex. 1

[126] *Beem*, 652 F.2d at 666 (quotation omitted).

[127] *E.g.*, *Haslauer v. North Country Adironack Co-op. Ins. Co.*, 654 N.Y.S.2d 447, 448 (App. Div. 1997).

that basis. Liberty does not contend that it did not receive answers to any of its questions in a timely manner. Rather, Liberty inquired into New Warren's corporate history and New Warren truthfully answered those questions, stating that it became an independent company as a result of a 1985 asset purchase. In other words, Liberty reserved rights on the basis that it needed to ask certain questions. It asked questions about New Warren's corporate history in 1993, got accurate answers to those questions, but failed to disclaim liability based on those answers at that time. As a result, Liberty's reservations of rights letters were ineffective to give New Warren notice of its intention to preserve its right to object to the ASA's transfer of coverage rights.[128]

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[128] I also reject all of Liberty's arguments to the extent they are based on the principle that the doctrines of waiver and estoppel may not be used to create or extend insurance coverage where none originally existed. Although that is an accurate statement of the law in each of the potentially relevant jurisdictions, *see, e.g., AIU Ins. Co. v. Block Marina Investment, Inc.*, 544 So.2d 998, 1000 (Fla. 1989); *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.*, 807 N.Y.S.2d 62, 67 (App. Div. 2006); *Palumbo v. Metro Life Ins. Co.*, 199 N.E. 335, 336 (Mass. 1935), a finding that New Warren is entitled to exercise the rights of an insured under the Houdaille Policies does not create coverage where none originally existed. Coverage does exist for the Warren Pumps liabilities involved in this litigation. That is, Liberty promised to cover claims related to the products manufactured by Warren Pumps during the relevant time periods. The doctrines of waiver and estoppel are available to preclude an insurer from declaring a forfeiture of coverage that it expressly promised to provide. *E.g.*, *Block Marina*, 544 So.2d at 1000 (noting the difference between a policy exclusion and a forfeiture of coverage that otherwise exists). Treating New Warren as an insured does not alter the scope of coverage as to Warren Pumps-related claims, merely the identity of the entity seeking it. Equally important, my primary holding on this motion is that Liberty agreed, after negotiations with Houdaille, to provide coverage to New Warren.

3. Liberty's Claim Of Mistaken Identity Is Not Persuasive

Although Liberty never explicitly makes this argument, underlying many of Liberty's contentions in this case is an insinuation that it was tricked into providing coverage to New Warren under the Houdaille Policies by New Warren's description of itself as a former division of Houdaille. Liberty contends that these descriptions are false because New Warren, as a distinct legal entity, is a complete stranger to Houdaille. It merely purchased some assets from Houdaille in the mid-1980's and never had the affiliation that the term "former division" implies.

But Liberty presents no evidence that it was actually misled or prejudiced by those descriptions, and the undisputed evidence shows that Liberty did not rely on them. When New Warren sought coverage under the Houdaille Policies, Liberty investigated New Warren's corporate history and, satisfied with the results of that investigation, it provided coverage. Testimony from the individuals involved, as well as internal Liberty correspondence from the early 1990's, confirms that Liberty understood New Warren to be a separate and independent company with no familial relationship with Houdaille.[129] The key Liberty executive, Billeter, knew about the 1985 Warren asset sale, understood it, and Liberty has had a copy of the Amendment in its files for twenty years. Moreover, when Liberty asked New Warren about its corporate history in 1993, New Warren specifically told Liberty that it became a separate and independent company as a result of an asset purchase.[130]

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[129] *E.g.,* Billeter Dep. at 152.
[130] *See* O'Brien Aff., Ex. 1.

More important, though, is the fact that New Warren's description of itself as a former Houdaille division came several years after Liberty had already begun providing coverage to New Warren under the Houdaille Policies. And New Warren's first mention of its relationship with Houdaille was fairly innocent. The May 30, 1991 letter in which New Warren notified Liberty of the Mississippi asbestos litigation in which it was named a defendant merely instructed Liberty to "accept this letter as official notice of claim on all Liberty Policy years in the insured's name Warren Pump, and or Warren Pump division of Houdaille Industries."[131] New Warren was obviously not a division of Houdaille at that time. Houdaille no longer existed and Liberty knew that. In this letter, New Warren was not claiming to be a former division of Houdaille, but was merely stating its belief that it was entitled to use Houdaille's occurrence-based liability policies for the years in which Houdaille owned Warren Pumps.[132]

Moreover, the concept of a "former division" is legally empty. A division is not a separate entity and is legally indistinct from the corporation in which it functions. Liberty therefore must have understood that New Warren was not using the phrase in a technical sense to describe its corporate pedigree, but simply to colloquially describe the fact that

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[131] Stipulation, Ex. 23.

[132] Liberty did not submit the May 30, 1991 letter to the court until the parties were specifically asked to supplement the record with regard to the statements made by New Warren. That is, Liberty did not initially present a full description of its communications with New Warren in this regard, opting instead to pepper the record with only the few seemingly most incriminating references. *Cf. Graffenstein v. Epstein & Co.*, 23 Kan 443, 446 (1880). ("A disposition, after entering into a contract which proves unfavorable, to search for some means of getting out of it, is unfortunate; it encourages misconstruction of statements, misrecollection of words, and willful falsehood. A party who finds on inquiry that he cannot avoid his contract, except by proof of misrepresentations by the other party, is under fully as strong temptation to impute such misrepresentations, as a party seeking a contract is to make them.").

Houdaille used to own Warren Pumps and to point Liberty in the direction of the insurance policies under which New Warren believed in good faith it had been transferred rights to coverage.

VI. Conclusion

For the reasons stated, New Warren's motion for partial summary judgment declaring that it is entitled to exercise all of the rights of an insured under the Houdaille and Warren-Only Policies is granted. Liberty's and Viking Pump's motions for partial summary judgment are denied.[133] The parties shall craft and submit an implementing order within ten days of the date of this opinion. IT IS SO ORDERED.

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[133] Because I hold that Liberty is precluded from invoking the anti-assignment clause as a result of its having effectively consented to Houdaille's transfer of coverage rights to New Warren, I need not reach the question, which the parties have briefed at length, of whether public policy concerns preclude an insurer from invoking an anti-assignment clause to deny coverage under an occurrence-based liability policy when the occurrence giving rise to the claim pre-dates the transfer. That is a difficult legal issue that several courts have struggled with recently. Most of them have concluded that an insurer cannot enforce an anti-assignment clause post-occurrence because the risk to the insurer is not increased by a post-occurrence transfer of policy rights. *E.g.*, *Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483 (N.D. Ohio 2006); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756 (Minn. Ct. App. 1999); *see also Northern Ins. Co. of New York v. Allied Mutual Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992); *but see Henkel Corp. v. Hartford Accident and Indem. Co.*, 29 Cal. 4th 934 (2003) (allowing an insurer to enforce an anti-assignment clause in similar circumstances). I note, however, that the transfer of coverage rights in the Amendment was not an assignment in the typical sense because Houdaille sought to retain full rights under the Policies for non-Warren Pumps claims while also vesting new and additional rights in New Warren. The question of Liberty's ability to prevent the creation of essentially a new insured under the Policies is different than the question of whether Houdaille could validly assign them. In any event, there is no guiding case law on either question in any of the jurisdictions whose law might govern. More importantly, the undisputed evidence shows that Liberty agreed to cover New Warren, thus giving the required consent. As a result, I decline to make a broad public policy pronouncement on an important issue of non-Delaware law, especially when that decision is unnecessary to make and should therefore be left for another day.