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Case No. N10C-06-141 FSS CCLD

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

VIKING PUMP, INC. and WARREN PUMPS, LLC,	)	
Plaintiffs,	)	C.A. No.: 10C-06-141 FSS CCLD
v.	)	
CENTURY INDEMNITY COMPANY, et al.	)	
Defendants.	)	

Submitted: June 28, 2013
Decided: October 31, 2013

Upon Plaintiffs' Motion for Final Judgment* and *Defendants' Renewed Motion for Judgment as a Matter of Law

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SILVERMAN, J.

Because they are defending thousands of asbestos personal injury cases, Plaintiffs, Viking Pump, Inc., and Warren Pump, LLC, seek indemnification and defense costs from Defendants, Plaintiffs' common excess insurers. Through a comprehensive general liability insurance plan originally bought by a common parent company, Houdaille Industries, there is approximately one half billion dollars in excess insurance at stake. For eight years, Plaintiffs have sought coverage under the plan.

For several reasons, the excess carriers have adamantly denied coverage. So, in October and November 2012, the court held a three-week trial on the assumption that the insurance policies are ambiguous. For the most part, the jury returned a Plaintiffs' verdict. This is the court's decision on the parties' post-trial submissions. Plaintiffs seek a final judgment incorporating the verdict. Defendants maintain that the policies are unambiguous and not subject to extrinsic evidence. Accordingly, for the most part, Defendants seek judgment notwithstanding the verdict.

Because the policies are unambiguous, the court finds that Defendants have, at a minimum, a duty to pay defense costs, which is in accord with the jury's verdict. The court also determined, however, that only some Defendants' defense costs will not reduce the applicable policy's limit, meaning the costs are "in addition

to" the policy's aggregate limit.

I. Background

The history leading to this complicated litigation has been written.[1] Briefly, between 1968 and 1988, Houdaille Industries, a large industrial conglomerate, owned Plaintiffs, two industrial pump manufacturers that incorporated asbestos-containing parts into their products.[2] During a fourteen year span, Houdaille bought commercial comprehensive general liability insurance ("CGL") in a seamless, layered plan.

Each year from 1972 through 1985, Houdaille purchased occurrence-based primary, or "first layer" insurance and umbrella, or "second layer" insurance, from Liberty Mutual. Above the Liberty umbrella, Houdaille purchased layers of excess insurance. In total, Houdaille purchased 35 excess policies through 20 different carriers. Houdaille's 14-year insurance tower offered $17.5 million in primary coverage, $42 million in umbrella coverage, and [redacted] in excess coverage.

The occurrence-based Liberty policies cover asbestos claims for any year

[1] *See Viking Pump, Inc. v. Liberty Mutual Ins. Co.*, 2007 WL 1207107 (Del. Ch. April 2, 2007) (Strine, V.C.) ("*Viking I*"); *Viking Pump, Inc. v. Century Indemnity Co.*, 2 A.3d 76 (Del. Ch. 2009) (Strine, V.C.) ("*Viking II*").

[2] *See* Aff. of John Winsbro, Esquire, in Support of Pltfs.' Motion for Proposed Form of Final Judgment Order After Trial, Ex. 1, Established Facts for Submission to Jury ("Undisputed Facts"), at ¶¶ 4 and 16, LexisNexis File & Serve Transaction ID ("Trans. ID") 49239633.

that exposure is alleged. For the most part, the Liberty 1980-1985 policies carry a $100,000 per-occurrence deductible. As discussed later, the deductibles were retroactively billed as part of Liberty's premiums.

In addition to Houdaille's 14-year CGL plan, Viking and Warren have separate policies. Warren allegedly had Liberty primary policies dating before 1966, and from 1966 through 1969. Also discussed later, the pre-1966 policies are physically lost. And, Warren holds a First State 1971-1972 umbrella policy that does not sit above Liberty coverage.

Liberty provided primary and umbrella coverage to Viking from 1968 through 1986, including the Houdaille policies. Additionally, Viking holds eight policies spanning 1964 through 1972. INA issued Viking two "excess blanket catastrophe liability policies," covering 1964-1970. For 1966-1972, London issued Viking two umbrella policies and four excess policies.

In 1985, Houdaille divested itself, leaving Viking and Warren as separate, independent entities. On October 28, 1987, Warren submitted its first asbestos claim to Liberty. Thus far, approximately ████ asbestos claims have been filed against Warren, and Viking is close behind with ████ claims. In April 2005, Liberty informed Warren that the last Warren-only policy exhausted.[3]

[3] Undisputed Facts at ¶ 59.

II. Phases I and II, The Court of Chancery Case

On June 30, 2005, based on the increasing asbestos litigation and believing that Warren was draining most of its shared insurance, Viking filed suit against Liberty in the Court of Chancery, seeking injunctive relief and coverage under the Houdaille 1972-1985 policies.[4] Fearing the consequences, Warren intervened. And, on April 2, 2007, the court held that Viking and Warren were covered under Houdaille's 14-year Liberty primary and umbrella policies.[5] That concluded the litigation's "Phase I."

Afterwards, in 2008, Liberty, Warren, and Viking settled several outstanding claims.[6] Importantly, after failing to find the "lost" 1960s policies, Warren and Liberty agreed to a $7 million settlement, creating a specified asbestos fund.[7] Additionally, Liberty settled an ongoing deductible dispute, resulting in Plaintiffs' [redacted] delinquent premium payment. Settling those matters led to Liberty's dismissal from the case. That said, the Liberty settlement's reasonableness and purpose were contested at the trial here.

With Liberty out, the excess insurers joined "Phase II." Several times before Phase II's climax, Chancellor Strine admonished the parties for their tactics.

[4] *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 1465-VCS.
[5] *Viking I*, 2007 WL 1207107 (Del. Ch.) (Strine, V.C.).
[6] Trans. ID 20807114.
[7] Undisputed Facts at ¶ 64. The fund exhausted in February 2010. *Id.* at ¶ 65.

For instance, to support their argument that Liberty's policies had not exhausted, the excess insurers demanded all of Liberty's files relating to Viking and Warren's underlying asbestos claim settlements. During a February 27, 2009 teleconference, Chancellor Strine called-out the excess insurers' discovery tactics as "combin[ing] torpidity and overbreadth," and considered Defendants' audit demand "absurd."[8] In the end, the Chancellor permitted the excess insurers to sample 10% of Liberty's files. The excess insurers ultimately obtained █ Warren claim files, hand-picked by excess insurers' expert.[9] As will be mentioned, it took Defendants a long time to accept that 10% ruling.

On October 14, 2009, Chancellor Strine decided cross-summary judgment motions in Phase II.[10] *Viking II* involved Viking and Warren's rights to the Houdaille excess coverage and the allocation method between the excess policies.[11] The excess carriers argued for pro-rata allocation, "which has the effect of reducing their obligations, and [Viking and Warren argued for] a so-called 'all sums' approach, which tends to provide [...] fuller coverage."[12] *Viking II*'s allocation holding depended on several factors, mainly the policies' trigger and anti-stacking provisions.

[8] Trans. ID 24185888.
[9] Undisputed Facts at ¶¶ 84 and 85.
[10] *Viking II*, 2 A.3d 76 (Del. Ch. 2009) (Strine, V.C.).
[11] *Id.* at 81.
[12] *Id.* at 107.

Analyzing four trigger theories, *Viking II* determined that New York law, which governed the excess policies,[13] "generally holds that an occurrence-based policy is triggered upon an 'injury-in-fact' to a tort plaintiff."[14] Elaborating,

> where contract language, such as that found in the Houdaille Policies, indicates that an 'occurrence' is 'injurious exposure to conditions, which results in personal injury,' then the injury-in-fact theory dictates that the plaintiff's exposure to asbestos attributable to the insured during the policy period triggers the policy. [...] the Houdaille Policies basically track[] the injury-in-fact theory. New York courts have generally found that a plaintiff who proves that she suffered compensable damage as a result of asbestos exposure is injured during all periods of material exposure and therefore that any policy is triggered if it was in existence when the exposure occurred. Therefore, New York law can be seen as treating each asbestos plaintiff's exposure and injury as a single 'occurrence' (that triggers all the multiple policies in place during the period of asbestos exposure).[15]

To satisfy the "injury-in-fact" trigger, a plaintiff must present a certain level of medical evidence. As will be discussed, *Viking II*'s "injury-in-fact" holding and the trigger's evidentiary standard were hotly contested during and after trial.

After determining the "trigger," *Viking II* considered how the triggered policies pay.[16] Viking and Warren's "all sums" argument meant "any policy that

[13] *Id.* at 82.
[14] *Id.* at 110.
[15] *Id.* at 110-11.
[16] *Id.* at 111.

covered part of a multi-period exposure is responsible -- up to the limits -- for all of the liability that resulted from the exposure as a whole."[17] So, all sums resembled "joint and several liability in the sense that the insured may collect against any insurer whose policy is triggered, up to the policy's relevant per-occurrence total limits."[18] Moreover, if a triggered insurer "is insolvent or otherwise incapable of paying, then the defendant, who paid the judgment, and not the plaintiff, bears the cost of the other defendant's inability to pay."[19]

In contrast, the excess insurers "pro-rata" argument allows "any given insurer, having only agreed to insure Houdaille for a fixed period of time, [to be] responsible for some [portion] of the liability the insured owes to a plaintiff."[20] *Viking II* recognized that a pro-rata approach would require the court to "arbitrarily divvy up the total liability of the insured among its insurers, treating them as if they were divisible injuries."[21] Ultimately, *Viking II* held that a pro-rata approach could leave an insured underinsured and required to "pay all the multiple insurers'

[17] *Id.* ("Under an all sums approach, [Viking] could choose a policy year under which to make its claim. For instance, it could submit the $1 million dollar liability to Granite State Insurance Company, which issued the first layer excess policy for 1979 (assuming of course that the primary and Umbrella policies for 1979 have been exhausted). As long as there was $1 million in coverage left in Granite State's coverage, Granite State would then have to pay out the full $1 million. Then, to the extent that Granite State believes it has borne too much of the liability, it can sue the other insurers for contribution.").

[18] *Id.*

[19] *Id.* at 111-12.

[20] *Id.* at 112.

[21] *Id.*

deductibles [...] in order to get the reduced amount the pro-rata approach leaves to recover."[22]

Holding "all sums" as the proper allocation, *Viking II* explained that "pro-rata" is inconsistent with the excess policies' language: specifically, the "non-cumulation" and "prior insurance" clauses, which prevent policy stacking.[23] The anti-stacking clauses "prevent an insured from submitting claims under several different policies [in an attempt to] evade per occurrence limits."[24] Moreover, the clauses "address the same concerns that generally recommend application of the pro-rata approach."[25] Hence, enforcing a pro-rata approach on policies containing anti-stacking provisions "would render [such clauses] needless."[26] The difference between "pro-rata" and "all sums" is important because the parties continued to contest the allocations' meaning and purpose. *Viking II*'s "all sums" holding is important because it ultimately formed the basis for several post-trial arguments.

Viking II left Plaintiffs without an equitable remedy, and Chancery

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[22] *Id.*

[23] *Id.* at 121 ("Under these clauses, recovery under one policy reduces an insured's recovery from policies in effect in other periods for the same occurrence (*e.g.*, continuous asbestos exposure), and an insurer must pay for injuries caused by that occurrence that continues into other periods. These Non-Cumulation and Prior Insurance Provisions cannot sensibly be applied within a pro-rata allocation scheme.").

[24] *Id.*

[25] *Id.*

[26] *Id.* at 123 ("Put another way, the inclusion of the Non-Cumulation Provisions means that an "occurrence," which is capable of triggering multiple policies, must nevertheless be viewed as causing only a single indivisible injury.").

without jurisdiction. Thus, at a June 9, 2010 conference, Chancellor Strine prepared to transfer the case to the Superior Court's Complex Commercial Litigation Division for Phase III's "end stage."[27] In the process, Chancellor Strine again lamented the parties' behavior and delay tactics, and observed that the parties had "discovered th[e] case to death."[28] Additionally, the Chancellor reiterated that the law of the case had been set and a transfer to another court would not change that.[29]

After a final threat of sanctions, Chancellor Strine transferred the case to the Superior Court on June 11, 2010, issuing a modified dismissal and transfer order, with schedules and parameters to expedite the CCLD litigation.[30] The order directed Plaintiffs to file opening summary judgment briefs by June 16, 2010, and Defendants' opening and answering briefs by July 13, 2010.[31] The order permitted page-limit extensions and discovery requests, but specifically prohibited "any party [from] fil[ing] a Rule 56(f) certification that, consistent with the Court's Bench

[27] *Viking Pump, Inc. v. Century Indemnity Co.*, C.A. No.: 1465-VCS, June 9, 2010 Status Conference Transcript, Strine, V.C., Trans. ID 31611328 ("June 9, 2010 Conf. Trans.").
[28] *Id.* at 10.
[29] *Id.* at 8; *Taylor v. Jones*, 2006 WL 1510437, *5-6 (Del. Ch. May 25, 2006) (Noble, V.C.) ("The 'law of the case' doctrine requires that issues already decided by the same court should be adopted without relitigation, and 'once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.'") ("The Delaware Supreme Court has explained that 'the law of the case doctrine is not inflexible in that, unlike *res judicata*, it is not an absolute bar to reconsideration of a prior decision that is clearly wrong, produces an injustice, or should be revisited because of changed circumstances.'").
[30] *Viking Pump, Inc. v. Century Indemnity Co.*, C.A. No.: 1465-VCS, June 11, 2010 Order, Strine, V.C., Trans. ID 31585662.
[31] *Id.* at 2-3.

Ruling of June 9, 2010, seeks discovery already produced, discovery requests that have been denied by the Court, or discovery requests that have been subject to limitation by stipulation."[32]

As will be discussed, the Superior Court, nevertheless, had to remind Defendants, frequently, about the discovery limitations and the law of the case. The litigants were impossible. While a litany is unnecessary, the Phase III tactics bear mention because they led to a drastic, procedural approach.

III. Phase III, The Superior Court Case

Plaintiffs initiated Phase III here on June 15, 2010,[33] for "the final phase of summary judgment practice and trial, if necessary."[34] With Liberty's primary insurance exhausted in 2008 and its umbrella insurance approaching exhaustion, Phase III only included Plaintiffs and the excess insurers.

The parties' main disputes were: whether the Liberty policies were properly exhausted and triggered the excess obligations, and whether the excess policies "follow-form" to the underlying Liberty policies. Several lesser-included issues permeating this litigation are: "loss runs,"[35] horizontal exhaustion, and Phase

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[32] *Id.* at 3.
[33] Trans. ID 31657566.
[34] Trans. ID 31585662.
[35] A "Loss run" is essentially a spreadsheet generated by a Liberty employee, which collects transaction data - payments, reimbursements, etc. - that have been made on Plaintiffs' policies. A "loss run" tracks the money going out to keep Liberty abreast of how much indemnity remains.

II's rulings' applicability. From the start, Defendants asserted that trial was unnecessary, as all the disputed issues required legal determinations from the court. But, also from the start, Defendants were unwilling to refine their claims.

Anyway, Plaintiffs' opening summary judgment brief was due June 16, 2010, with Defendants' opening and answering briefs due by July 13, 2010. Only Viking obeyed the Chancellor's scheduling order.[36] Instead of the court-ordered briefing, a free-for-all began, with the parties continuing the behavior that Chancellor Strine had repeatedly condemned. For instance, the briefing schedule had an original August 24, 2010 deadline. After they finished briefing in November 2010, three months behind schedule, the parties requested expedited argument.

On December 17, 2010, the court responded to the parties' request for expedited argument by requesting proposed findings of fact and conclusions of law, and a stipulated expedited schedule.[37] The parties generally criticized each other's submissions. Ultimately, the parties submitted over 50 briefs, letters, and other supplemental materials regarding the summary judgment motions, which the court heard on May 31, 2011.[38] On September 16, 2011, the court denied Defendants International Insurance Company and Safety National Casualty's motion to further

[36] Trans. ID 31682949.
[37] Trans. ID 34918969.
[38] *See* Trans. ID 38694279.

supplement the record.[39]

On November 15, 2011, after receiving more unsolicited letters, and after having considered hundreds of pages in briefs, the court denied all summary judgment motions, finding:

> At present, at least 14 motions and cross-motions are pending. They include motions for partial summary judgment relating to many aspects of the relevant policies, including applicable law, the effect of prior rulings, coverage triggers, defense obligations, and exhaustion of policies. Even before the latest submissions, one party's list of issues raised was 27 pages long.
>
> After reviewing all submissions, the court has determined that "it seems desirable to inquire thoroughly into [the facts] in order to clarify the application of law to the circumstances."[40]

The order declared the court would not consider pre-trial motions, other than discovery disputes.[41] And, any discovery dispute upon which the court had to intervene would occur at the loser's expense.[42] The court also limited the parties' trial presentation to five days for each side.[43] Lastly, the court acknowledge that "under [the] Order the parties must present evidence on issues that may be mooted by the court's post-trial legal decision. Unfortunately, that result is required by the manner

[39] Trans. ID 39905919.
[40] Trans. ID 40886580.
[41] *Id.* at 2.
[42] *Id.*
[43] *Id.* at 3.

in which the parties have litigated [....]"[44]

Despite the courts' repeated admonitions, the run-up to trial featured another blizzard of filings. The parties sought to file even more summary judgment motions. Hoping the parties would finally exercise restraint and allow the court to narrow the trial, the court allowed the parties to file "specimen briefs," without the court promising consideration.[45] The court intended to decide a reasonable number of core issues, provided the parties would cooperate. Alas, the parties persisted. They were unwilling to focus the court on a manageable number of core disputes. So, the court stood by its denial of summary judgment and focused on trial.

When the court finally stanched the open-ended, unmanageable summary judgment practice, abusive pretrial motion practice began. The parties submitted ten motions *in limine* and seemingly countless letters claiming foul. The drive, of course, behind Defendants' discovery demands was to nullify the Chancellor's discovery limitations, specifically as they related to the 10% audit. Defendants' behavior also caused Liberty, a non-party, to complain about Defendants continued demands for additional, repetitive discovery and depositions.[46] After an untimely, eleventh motion filed by Defendants, on August 17, 2012, the court finally sanctioned Defendants for

[44] *Id.*
[45] Trans. ID 43895492.
[46] Trans. ID 44210258.

disruptiveness, lack of candor, and inability to accept the law of the case.[47] The court then decided the parties' motions *in limine* in stages.[48]

Proposed *voir dire* and jury instructions spawned more disputes. After a paper battle regarding disputed and undisputed facts, the court, several times, requested clarity and assistance from the parties.[49] Yet again, after the court spent substantial time and effort attempting to help in the weeks before trial, the court sanctioned Defendants for wasteful, unhelpful, and dishonest discovery practice.[50]

Surprisingly, the case eventually made its way before a jury. More surprisingly, counsel conducted the trial with skill and dispatch. The trial was focused and the case was put before a jury efficiently and helpfully. At trial, counsel could not have been more professional. Regrettably, the court had to bring up the past so as to explain why the court skipped over summary judgment, insisting on trial first. The trial-first, motions-later affects the verdict's significance.

IV. The Trial

Again, the trial was meant to clarify all potential factual issues. It proceeded on the untested assumption that the excess policies were ambiguous. Obviously, the assumption was necessary because non-ambiguous contracts are

[47] Trans. ID 45960302.
[48] Trans. IDs 46065519 and 46295891.
[49] *See* Trans. IDs 46116078 and 46425390.
[50] Trans. ID 46519545.

interpreted as a matter of law. The evidence presented can be categorized into four major topics: exhaustion, defense obligations, trigger, and non-cumulation/prior insurance clauses. Several witnesses testified on more than one topic.

A. Exhaustion

Exhaustion was presented essentially in two parts: (1) the reasonableness of the underlying asbestos litigation as it related to Plaintiffs' defense strategy and Liberty's settlement payments, and (2) Liberty's policy processing procedures. The parties addressed exhaustion by presenting evidence regarding Liberty's processes, records and deductible allocations, and through Plaintiffs' National Coordinating Counsel's ("NCC") methodology and settlement strategies. The point was to show that Liberty appropriately exhausted its policies, not by simply "opening the faucet," putting the indemnity obligations on the excess carriers.

Judith Perritano, Esquire, and her firm, Pierce, Davis and Perritano ("Pierce Davis"), represented Warren as its NCC. Perritano and Patrick Lamb, Esquire, Viking's NCC, testified for Plaintiffs as to the reasonableness of the underlying asbestos claims' settlements. The parties, however, did not contest the reasonableness of Viking's settlements.

Perritano testified about her firm's relationship with Liberty and NCC's strategies and results. In 2004, when Warren hired Pierce Davis, approximately

asbestos personal injury cases had been filed.[51] Between 2004 and 2010, the claims had increased to [52] with approximately pending.[53] Perritano testified that of the were dismissed without any payment.[54]

Perritano further testified that Warren's underlying asbestos litigation involves claimants suffering from mesothelioma, asbestosis, or lung cancer.

[51] October 24, 2012 Trial Transcript ("Tr. Trans.") 21:5-10.
[52] *Id.* at 24:9-19.
[53] *Id.* at 24:12-15.
[54] *Id.* at 25:9-21.
[55] *Id.* at 25:22-26:16.
[56] *Id.* at 49:21-23.
[57] *Id.* at 26:23-27:10.
[58] *Id.* at 50.
[59] *Id.* at 29:3-30:5.

[60] *Id.*
[61] *Id., passim* 127-130.
[62] *Id.* at 73:6-9.
[63] Oct. 23, 2012 Tr. Trans. at 238:6-7.
[64] Oct. 24, 2012 Tr. Trans. at 143:20-144:3.
[65] *Id.* at 143:2-144:3. The court notes that the parties did not present evidence regarding what constituted a proper sampling.
[66] *Id.* at 152:10-11.
[67] *Id.* at 190:13-18.

[68] *Id.* at 194:15-195:2.
[69] *Id.* at 195:13-197:9.
[70] *Id.* at 206:8-10.
[71] *Id.* at 202:1-9.
[72] *Id.* at 207:14-19.
[73] Nov. 7, 2012 Tr. Trans. at 126:11-17.
[74] *Id.* at 127:19-21 and 131:2-132:19.
[75] *Id.* at 152:10-18.
[76] *Id.* at 156:1-10.

[illegible][80]

As to Liberty's policy handling and exhaustion determination, Plaintiffs called Craig Evans, manager of special products in Liberty's risk claims department. From March 2004 through August 2010, Evans was responsible for authorizing indemnity and defense payments made by Liberty on Warren's behalf.[81] Evans testified about Liberty's decision to hire Pierce Davis and Liberty's "meritorious defense strategy."[82] Evans further testified about Liberty's claim evaluation process, payment guidelines, and his personal Excel spreadsheet used to track all Warren claims.

Plaintiffs also presented Liberty's managing consultant of complex and emerging risks responsible for coverage determination, Carl Brigada.[83] With 36 years at Liberty, Brigada testified about his extensive knowledge of Liberty's policy

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[77] *Id.* at 160:18-21.
[78] *Id.* at 162:11-12.
[79] *Id.* at 161:6-8.
[80] *Id.* at 165:4-166:14.
[81] Oct. 23, 2012 Tr. Trans. at 195:18-196:14.
[82] *Id.* at 68:21.
[83] Oct. 25, 2012 A.M. Tr. Trans. at 34:2-8.

forms.[84] Brigada's involvement with Liberty's Viking and Warren accounts began in 2003, when he was asked to assist with the "lost policy" problem.[85] Brigada testified about Liberty's deductible and his "loss run" documents used to track Liberty policies' exhaustion.

As to deductibles, Brigada testified that Liberty's deductibles are based on a policy endorsement.[86] And, unlike typical auto insurance, the deductible is not paid when each claim is made, but charged in stages: the advanced premium, deductible premium, and excess premium.[87] The equation is policy-based,[88] but is essentially a "cash flow plan," allowing the "deferring of premiums [...] over time."[89] According to Brigada, the Liberty deductible is "nothing more than a device that's used to calculate the amount of the premium"[90] and as such, deductibles have no bearing on a policy's exhaustion.[91] Brigada testified that based on the 2008 settlement with Liberty, Plaintiffs satisfied their deductibles for the pertinent, deductible-owing policies.[92]

Further, Brigada's responsibility on the Viking and Warren accounts

[84] *Id.* at 34:2-4 and 37:8-38:23.
[85] *Id.* at 39:12-40:15.
[86] *Id.* at 73:5-12.
[87] *Id.* at 78:6-79:15.
[88] *Id.* at 94:4-11.
[89] *Id.* at 77:22-78:1.
[90] *Id.* at 78:11-12.
[91] *Id.* at 80:17-22.
[92] Oct. 25, 2012 P.M. Tr. Trans. at 7:13-17.

included determining if and when exhaustion occurs.[93] To track the policies' limits, Brigada pulled "loss runs" from Liberty's data warehouse, which is essentially a computer server.[94] The information from the data warehouse was generated each time Brigada authorized a payment, or a financial transaction was made to a specific claim file.[95] When Brigada authorized a settlement payment, he would spread the payment across all policies triggered. For instance, if the 14 years of Liberty's primary layer were triggered on a $140 settlement, Brigada recorded the loss by applying $10 to each year.[96] Ultimately, Brigada testified that his loss runs indicated that Liberty paid more than [redacted] in indemnity payments towards all the Houdaille policies' insureds, exhausting Liberty's policies.

Testifying for Defendants was Theresa Carpenter, a senior claims specialist for International and Century, assigned to the Viking and Warren accounts since 2006.[97] Believing no defense obligations existed, and acting under a reservation of rights, Carpenter authorized [redacted] indemnity and [redacted] defense payments under the first International excess policy, thereby exhausting it.[98] After the International policy exhausted, Carpenter paid [redacted] through INA/Century,

[93] *Id.* at 41:21-42:4.
[94] *Id.* at 23:10-20.
[95] *Id.* at 98:16-99:19.
[96] *Id.* 31:12-32:2.
[97] Nov. 5, 2012 Tr. Trans. at 230:2-231:16.
[98] Nov. 7, 2012 Tr. Trans. at 88:16-89:11.

also under a reservation of rights.[99] Additionally, Carpenter testified that she attempted to settle with Warren on Century's behalf by sending a [redacted] check restricted to settlement payments only.[100] Because Warren believed Century had defense obligations, Warren returned the check and, even with the money refunded, Carpenter testified that [redacted] "went out the door" and it reduces Century's aggregate limits.[101]

Carpenter further testified that International stopped paying in August 2011, and both International and INA want their money back[102] because they believe the underlying Liberty umbrella policies were not, and are not, exhausted.[103] Carpenter testified that Liberty's 1980-1984 and 1986 policies contained a $100,000 per-occurrence deductible,[104] and Liberty's failure to capture Plaintiffs' deductible payment would artificially erode the indemnity limits.[105] Although she does not believe Liberty made a mistake in its payments,[106] Carpenter testified that "Liberty failed to apply the deductibles and, without paying the deductibles, there's a lot of money left owed under those Liberty policies."[107] Important here, Carpenter's

[99] *Id.* at 85:22-88:23.
[100] Nov. 9, 2012 Tr. Trans. at 131:15-132:7.
[101] Nov. 9, 2012 Tr. Trans. at 131:15-22.
[102] Nov. 5, 2012 Tr. Trans. at 256:12-21.
[103] Nov. 9, 2012 Tr. Trans. at 121:2-123:6.
[104] *Id.* at 110:16-111:10.
[105] *Id.* at 109:16-23.
[106] Nov. 7, 2012 Tr. Trans. at 32:21-33:3.
[107] *Id.* at 32:8-12.

deductible theory contradicts Brigada's testimony that the deductible was "nothing more than a device that's used to calculate the amount of the premium."[108]

After reviewing Evans's spreadsheet and Brigada's loss runs, Carpenter determined that a deductible was not applied to each claim. Based on Carpenter's calculations, after applying a deductible to each policy that paid on an occurrence,[109] Carpenter opined that Liberty is still obligated to an outstanding [redacted] in indemnity limits.[110]

Further, Carpenter testified that Warren's NCC was very knowledgeable about Warren's products and records.[111] Carpenter testified that she had "significant" contact with David Hunter, Esquire, of Pierce Davis and "spoke with him almost every day."[112] [redacted] [113] [redacted] [114]

B. Trigger

The Liberty umbrella policies covered "personal injury or bodily injury

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[108] Oct. 25, 2012 A.M. Tr. Trans. at 78:11-12.
[109] Nov. 9, 2012 Tr. Trans. at 112:14-113:22.
[110] *Id.* at 123:3-6.
[111] Nov. 7, 2012 Tr. Trans. at 61:19-63:1
[112] *Id.* at 15:9-22.
[113] *Id.* at 63:15-65:2.
[114] *Id.* at 72:6-11.

which occurs during the policy period."[115] Again, *Viking II* held that Defendants' policies are triggered by an "injury-in-fact," and that "the plaintiff's exposure to asbestos attributable to the insured during the policy period triggers the policy."[116] Therefore, the evidence regarding trigger addressed two issues: 1) whether the underlying asbestos plaintiff claimed an "injury," and 2) whether that potential injury existed during the policy periods. For the underlying asbestos claims, coverage turned on when a claimant is actually injured, a factual dispute. Accordingly, the parties presented experts on asbestosis and mesothelioma.

[115] *Viking Pump II*, 2 A.3d at 108 ("All of the excess policies either follow-form to this coverage or have their own provisions that commit to substantively identical coverage.").
[116] *Id.* at 110-11.
[117] Oct. 31, 2012 Tr. Trans. at 130:2-131:9.
[118] *Id.* at 162:15-163:21.

[125]

Both NCCs testified about trigger in an attempt to show that Liberty settled only on cases that satisfied the "injury-in-fact" standard. Perritano testified about when claimants generally alleged injury, and what Liberty required for a specific claim to trigger coverage.

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[119] Nov. 2, 2012 Tr. Trans. at 12:8-21:20.
[120] *Id.* at 27:8-28:16.
[121] *Id.* at 80:9-15.
[122] *Id.* at 67:6-17.
[123] *Id.* at 25:14-22.
[124] *Id.* at 75:5-9.
[125] *Id.* at 47:15-48:8.
[126] Oct. 24, 2012 Tr. Trans. at 69:16-18.

[129]

[134]

Evans defined "trigger" as [135] Again,

as the person responsible for authorizing Liberty's indemnity and defense payments,

[127] *Id.* at 47:18-48:6 and 70:22.
[128] *Id.* at 69:19-79:4.
[129] *Id.* at 73:6-9.
[130] Oct. 31, 2012 Tr. Trans. at 27:10-11.
[131] *Id.* at 27:12-13.
[132] *Id.* at 29:15-18.
[133] *Id.* at 55:15-20.
[134] *Id.* at 56:14-57:8.
[135] Oct. 23, 2012 Tr. Trans. at 186:9-11.

Evans testified that

[136]

The jury was left with a tree-falling-in-the-forest conundrum. It decided injury occurs before manifesting itself as diagnosable illness.

C. Defense Obligations

The defense obligation issue included several sub-parts, precipitating abundant evidence. Plaintiffs argued that Liberty's umbrella and primary policies carried defense obligations beyond the indemnity limits and, because Defendants' policies followed form, the excess carriers had the same obligations.

Defendants presented evidence that the Liberty umbrella policies did not have defense obligations, resulting in Liberty's unnecessarily paying more than beyond its obligations. In the event the jury determined Liberty had defense

[136] *Id.* at 185:15-19.

obligations and the excess policies followed form, Defendants presented alternative evidence that the excess policies contained specific defense obligation exclusions. Specifically, Defendants presented evidence on policy clauses they argue negate a duty to defend, such as "consent" and "assistance and cooperation" clauses.

Brigada, responsible for coverage determination at Liberty, testified that according to Liberty's policies' terms and conditions, Liberty was required to pay defense costs contemporaneously, in addition to the policies' indemnity limits.[137] Brigada testified that before Warren tendered claims against Liberty's policies, a "corporate decision" was made obligating Liberty to pay defense costs.[138] Since 1976, Liberty instructed Brigada that "under the Liberty umbrella forms, [defense costs] would be paid in addition to limits."[139] Brigada read the policies' language as supporting that.[140]

Dennis Connolly, Esquire, Plaintiffs' insurance expert and previous Liberty in-house counsel, testified about the insurance industry's customs and practices, and how they relate to Liberty's and Defendants' policies. Connolly testified that generally, asbestos defense costs exceed indemnity by a 2:1 ratio.[141] It

[137] Oct. 25, 2012 P.M. Tr. Trans. at 14:21-15:8.
[138] *Id.* at 17:20-18:11.
[139] *Id.* at 18:5-18.
[140] *Id.*
[141] Nov. 1, 2012 A.M. Tr. Trans. at 27:14-18.

is industry practice to have low-limit primary insurance,[142] with umbrella and excess policies above that.[143] And, primary and umbrella policies generally contain defense and indemnity obligations, but in separate sections.[144]

Further, policies typically follow-form in order to give the insured seamless coverage, with each policy carrying the same obligations.[145] If an insurer deviates from the underlying policy it follows, an industry principal requires that insurer to disclaim in "clear, prominent language that [it] follow[s] [...] with the exception that [it does not] do the following."[146] As to Plaintiffs' coverage, Connolly testified that it was typical, with each excess insurer following form. Connolly opined (and the jury agreed) that one Defendant, International Surplus Lines Insurance Company ("ISLIC") successfully exempted itself from covering defense costs.[147]

Yale Law School economics and insurance professor, George Priest, countered Connolly and Brigada's testimony. Professor Priest testified that "complicated commercial [insurance] programs [...] seldom have seamless coverage."[148] And, primary policies contain indemnity and defense obligations within the same clause, while umbrella policies detail indemnity and defense obligations in

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[142] *Id.* at 28:21-23.
[143] *Id.* at 29:2-5.
[144] *Id.* at 29:18-30:3.
[145] *Id.* at 30:10-31:20.
[146] *Id.* at 31:15-32:8.
[147] Nov. 9, 2012 Tr. Trans. at 107:15-20; 120:2-8; 134:19-135:19.
[148] *Id.* at 217:17-20.

two, separate clauses.[149] Professor Priest testified that umbrella policies offer coverage beyond what the primary policies delineate.[150] Similarly, Liberty's umbrella policies disclaim defense obligations that are covered by Liberty's primary policies.[151]

As others testified, because excess policies sit far above the primary layer and do not provide defense obligations, defense coverage is generally not needed, resulting in low premiums.[152] Additionally, excess policies do not cover defense obligations because the excess insurers do not have the basic infrastructure to handle that work.[153] "Custom and practice" dictate that it is "very rare" for an excess policy to provide defense.[154] Professor Priest proffered that "not one" excess policy at issue contains a defense obligation.[155]

Roger Quigley, managing underwriter at Crum and Foster, and having previously worked for International, testified that "most, if not all" excess forms were "sleep insurance," issued without defense coverage, making the policies inexpensive.[156] As Defendants rely heavily on their policies' follow-form exclusions, Quigley's testimony focused on follow-form exclusions and their meaning. According

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[149] *Id.* at 213:6-18.
[150] *Id.* at 208-9.
[151] *Id.* at 215:14-19.
[152] *Id.* at 203:2-15.
[153] *Id.* at 204:14-205:14.
[154] *Id.* at 232:16-19.
[155] *Id.* at 216:11-16.
[156] Nov. 5, 2012 Tr. Trans. at 66:10-20.

to Quigley, for example, International's 1985 policy followed form, but specifically excluded defense obligations: "as otherwise stated herein, and except with respect to (1) any obligation to investigate or defend any claim or suit, or (2) any obligation to renew the insurance afforded by this policy shall apply in a like manner as the underlying insurance described in the declarations."[157]

Further, Quigley testified that a policy's "assistance and cooperation" clause does not provide defense obligations, rather "gives the company the right to associate itself in the handling of any claim."[158] Quigley testified that such clauses are intended to allow the insurer to intervene where its interests were at risk or where it felt it could better handle the defense.[159] Similarly, while not creating defense obligations, clauses giving an insurer the opportunity to "associate" with an insured's defense or requiring an insurer's "consent" before costs or payments are made permit an insured to incur defense costs only upon the insurer's authorization.[160] In some instances, defense costs incurred with the insurer's consent would not erode the policy's aggregate limit. Those clauses independently do not, however, create a defense obligation.[161]

Carpenter, who was responsible for nine International and Century

[157] *Id.* at 50:10-51:5.
[158] *Id.* at 51:12-52:5.
[159] *Id.* at 52:11-21.
[160] *Id.* at 53:3-18.
[161] *Id.* at 54:1-56:3.

policies, testified that those policies did not carry defense obligations.[162] Although Carpenter paid defense costs under those policies, she adamantly insisted that the payments were made subject to a reservation of rights, meaning if it were determined that defense obligations did not exist, International and Century were entitled to reimbursement.[163] Additionally, Carpenter testified that the policies she dealt with "follow[ed] form except as regards to the premium and the amount and limits of the policy."[164]

Bernard Heinze, Esquire, prior chief national litigation counsel for Reliance Insurance Company, discussed differences between primary, umbrella, and excess coverage. Primary insurance has high premiums because its core purpose is defense in addition to a policy's indemnification limit.[165] Umbrella policies' defense obligations are limited and, if required, paid in addition to the indemnification limits.[166] If no coverage remains in the primary layer, the umbrella will drop down and defend, eroding its limits.[167] In contrast to primary and umbrella policies, excess policies "carry no defense obligation, but where there is, it's all paid within the limits."[168]

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[162] *Id.* at 239:15-16.
[163] *Id.* at 239:19-240:2
[164] *Id.* at 245:18-20.
[165] Nov. 13, 2012 Tr. Trans. at 88:5-10.
[166] *Id.* at 88:11-19.
[167] *Id.* at 88:15-19.
[168] *Id.* at 89:3-5.

D. Non-cumulation and Prior Insurance

Viking II addressed the policies' non-cumulation and prior-insurance clauses as they applied in all sums allocation. Again, non-cumulation and prior insurance clauses are anti-stacking clauses, "designed for a situation in which different policies are responding to the same injury."[169] *Viking II* holds that "by following form to the Non-Cumulation and Prior Insurance clauses, the excess policies are only sensibly read as applying to all prior insurance in the comprehensive program, of which the excess polies are an integral part."[170] While *Viking II* dealt with this issue, Defendants contested the clauses' purposes contrary to *Viking II*.

Even though Defendants adamantly contested *Viking II*'s applicability in this regard, their own witness – out of the jury's presence – agreed *Viking II* was correct. Professor Priest testified that pro-rata allocation is inconsistent with non-cumulation clauses because it would require a claim's application in each yearly insurance tower, regardless of whether that year's tower had been effected by an earlier one.[171] Priest said *Viking II* "wasn't a revelation, [and] several other courts have adopted all sums."[172] Brigada also testified that during his years with Liberty, Liberty consistently took the position that payment on one claim does not eliminate

[169] *Viking II*, 2 A.3d at 122.
[170] *Id.* at n. 165.
[171] Nov. 9, 2012 Tr. Trans. at 77:1-82:13.
[172] *Id.* at 82:17-83:3.

another claim's coverage.[173]

E. Aetna XN Policies

Travelers, successor to the Aetna XN policies, argued that Aetna's policy was triggered only on a sole "catastrophic loss," an occurrence exhausting all underlying policies Aetna sits above. Plaintiffs argued otherwise. Each side presented witnesses.

James Britt, an insurance consultant with 44 years experience, 17 years of which at Aetna, testified for Plaintiffs about Aetna XN policies. As third and fourth layer excess policies, the Aetna excess sits atop [redacted][174] and requires a catastrophic loss to trigger indemnity.[175] Britt testified that, contrary to Aetna's position that the policies do not drop down unless a catastrophic event exceeding the underlying [redacted] occurs,[176] Aetna's policies are triggered when a loss exceeds any deductible and the underlying policy limits.[177] Further, Britt testified that "catastrophic" has two definitions: an individual large loss, such as a hotel fire, or an "accumulation of losses that collectively would be treated as a catastrophe."[178] According to an Aetna inter-office bulletin and Britt's training, the rising frequency

[173] Oct. 25, 2012 P.M. Tr. Trans. at 40:20-21.
[174] Nov. 2, 2012 Tr. Trans. at 169:22-16.
[175] *Id.* at 196:8-197:1.
[176] *Id.* at 167:5-11.
[177] *Id.* at 191:16-193:17.
[178] *Id.* at 196:10-18.

of small product liability claims, *in toto*, was considered a catastrophic event.[179]

James Robertson, a former underwriter on umbrella policies, testified Aetna XN policies are not triggered upon the underlying policy's exhaustion, rather "only apply to the excess portion of each net loss that occurs on an individual basis."[180] Robertson described four types of excess coverage: excess of loss, aggregate excess, umbrella, and umbrella excess.[181] The Aetna XN policies are "excess of loss insurance,"[182] which "responds as a result of losses that exceed the underlying limits on account of any one accident or occurrence."[183] So, according to Robertson, a single claim would have to exceed the underlying [REDACTED] before Aetna is triggered.[184] Robertson specifically disagreed with Britt, claiming Britt misconstrued documents.[185]

V. The Verdict
A. Prayer Conference

Again, Defendants were emphatic that the policies were clear as a matter of law, and trial was only meant to resolve factual issues Plaintiffs' raised.[186] Nevertheless, during the trial's prayer conference, the court found the parties'

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[179] *Id.* at 182:6-186:23.
[180] Nov. 5, 2012 Tr. Trans. at 151:21-152:6.
[181] *Id.* at 166:17-172:6.
[182] *Id.* at 165:9-166:1 and 172:7-9.
[183] *Id.* at 172:7-13.
[184] *Id.* at 191:16-22.
[185] *Id.* at 181:22-185:4.
[186] *See* Nov. 14, 2012 Tr. Trans. at 74:6-11.

proposed verdict forms were virtually irreconcilable.[187] Moreover, at the eleventh hour, the parties remained in contention as to whether outstanding issues were factual or legal. After significant back-and-forth regarding the verdict form, the parties made several stipulations.

First, the parties agreed that the deductible issue is "all-or-nothing": the deductible is either per-occurrence or a premium adjustment.[188] Second, Plaintiffs and ISLIC stipulated that ISLIC's policies successfully excluded any duty to defend.[189] The other stipulations stemmed from Plaintiffs' proposed jury questions 9 and 10:

> 9. Did any Excess Insurance Company other than ISLIC prove that its policy does not follow-form to any obligation to pay defense costs? ____ YES ____ NO
>
> If the answer to this question is "YES," please indicate which groups of policies negate the obligation to pay defense costs (Check any that apply):
>
> Policies with the "assume charge" language, such as the "Company shall not be obligated to assume charge of the settlement or defense of any claim or suit brought or proceeding instituted against the Insured":
>
> Policies that contain "consent" clauses, such as "no costs shall be incurred by the Assured without the written consent of the Underwriters":
>
> Policies that define "ultimate net loss" to exclude defense

[187] *Id.* at 25:10-17.
[188] *Id.* at 54:10-56:18.
[189] *Id.* at 68:16-20.

> costs but also include "Incurring of Costs" and "Apportionment of Costs" provisions:
>
> Policies stating that "the insurance afforded by this certificate shall not apply to any expense for which insurance is provided in the primary insurance":
>
> 10. Did any Excess Insurance Company other than ISLIC prove that its policy does not follow-form to any obligation to pay defense costs in addition to the policy limits? ___YES ___NO
>
> If the answer to this question is "YES," please indicate which groups of policies negate the obligation to pay defense costs in addition to limits (Check any that apply): [Same list as Question 9][190]

After open discussion regarding jury confusion, and based on the ISLIC stipulation, Plaintiffs agreed to remove the "other than ISLIC" references.

The remaining stipulations regarding Questions 9 and 10 also involved substantial back-and-forth. This colloquy is important for two reasons: 1) perceptively, the jury sent a note specifically regarding these questions, and 2) as will be discussed, despite counsels' assurances and their stipulations, in their post-trial arguments the parties' take issue with the colloquy.

Initially, Defendants objected to Plaintiffs' proposed Question 9 and offered the Excess Insurer's proposed Question 12 in its place.[191] Defendants argued

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[190] Pltfs.' Proposed Jury Veridct Form at pp. 4-5, Trans. ID 47705792.

[191] Nov. 14, 2012 Tr. Trans. at 69:21-70:1; *see* Excess Insurer's Proposed Jury Verdict Form at p. 4, Trans. ID 47706090. Excess Insurer's Question 12 reads: Do policies, such as the 1982-83

that Plaintiffs' Question 9 failed to include the clause presented in the Excess Insurer's Question 12.[192] After Defendant's conceded that fact-finding regarding Excess Insurer's Question 12 was unnecessary, the court adopted Plaintiffs' Question 9 in whole.[193]

Defendants then objected to Plaintiffs' Question 10, arguing:

> [T]he subparagraphs [...] will completely confuse the jury. It doesn't track our argument at all. It's not whether or not you have these – this text in here that drives whether or not this defense is within limits or not. It's the fact that these were indemnity policies with capped indemnity limits on them. And that's what [Defendants'] 19[194] and 21[195] [in the Excess Insurer's Proposed Verdict Form] was trying to convey.[196]

Defendants further argued that Question 10's subparts failed to follow their argument and should be removed entirely.[197] Plaintiffs argued to keep the subparts to further the

International policy, providing "Except as otherwise stated herein, and except with respect to (1) any obligation to investigate or defend any claim or suit, or (2) any obligation to renew, the insurance afforded by this policy shall apply in like manner as the underlying insurance described in the Declarations" require insurer pay to defend asbestos claims against Warren and Viking?

[192] Nov. 14, 2012 Tr. Trans. at 70:16-71:6.

[193] *Id.* at 71:20-72:8; Final Verdict Form at No. 7, Trans. ID 47754871.

[194] Excess Insurer's Proposed Question 19, Trans. ID 47706090 at p. 5, reads: Do the insurers whose policy language is referred to in question 18[, policies without any specific defense-related language,] have to pay defense costs over and above the policy's aggregate limits?

[195] Excess Insurers Proposed Question 21, Trans. ID 47706090 at p. 6, reads: Do policies providing that they will "indemnify the assured" for "damages, direct or consequential and expenses . . . caused by or arising out of each occurrence" and which further provide that "the Company shall then be liable to pay only the excess thereof" up to certain referenced policy limits, require paying defense costs over and above the policy's aggregate limits?

[196] Nov. 14, 2012 Tr. Trans. at 72:19-73:5.

[197] *Id.* at 75:20-23.

trial's purpose – clarifying ambiguities in the policies.[198] Defendants contended that their argument was different: that "the consent clause itself [determines whether] you pay within limits or not."[199] Defendants ultimately agreed that Plaintiffs' Question 10 was an "all-or-nothing question [....] It's either they all owe [] outside of limits, or none of them."[200]

Plaintiffs conceded that Excess Insurer's Question 21 posed a question of law, and ultimately removed the specific carve-out language from their proposed Question 10.[201] The parties then agreed that any policy's defense cost "carve-out" was a matter of law and post-trial briefing would not include arguments as to the jury's thinking.[202]

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[198] *Id.* at 76:7-77:3.
[199] *Id.* at 79:1-4.
[200] Nov. 14, 2012 Tr. Trans. at 79:14-19.
[201] *Id.* at 80:5-82:8.
[202] *Id.* at 81:14-82:13:

> **Ms. Cohen**: It's still a question of law with [Defendants' proposed question 21 ....]
>
> **The Court**: Wait a minute, I think you just said it all. It's a question of law and [D]efendants stand for the proposition that the law is on their side.
>
> **Mr. Paulson**: We do stand for that proposition [and conducted the trial under the assumption the policies are ambiguous.]
>
> **The Court**: [...I]f it comes down to it in briefing, [P]laintiffs are not going to, in effect, suddenly announce that they have a different theory that turns on this factual finding that we all just agreed is unnecessary. And Miss Cohen is nodding yes [....]
>
> **Mr. Paulson**: I'm nodding yes, as well.

B. The Note

During deliberations, the jury submitted a note regarding Question 7 (Plaintiffs' proposed Question 9 relating to defense costs). Question 7 asked: Did any Excess Insurance Company prove that its policy does not follow-form to any Liberty obligation to pay defense costs? If the jury answered "yes," they were asked to determine, out of four categories, which group of policy language negated a defense obligation:

> 1. Policies with the "assume charge" language, such as the "Company shall not be obligated to assume charge of the settlement or defense of any claim or suit brought or proceeding instituted against the insured,
>
> 2. Policies that contain "consent" clauses, such as "no costs shall be incurred by the Assured without the written consent of the Underwriters"
>
> 3. Policies that define "ultimate net loss" to exclude defense costs but also include "Incurring of Costs" and "Apportionment of Costs" provisions, and
>
> 4. Policies stating that "the insurance afforded by this certificate shall not apply to any expenses for which insurance is provided in the primary insurance.

Similarly, Question 8 asked: Did any Excess Insurance Company prove that its policy does not follow-form to any Liberty obligation to pay defense costs in addition to the

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The Court: So, it's understood now that we're not going to hear about "here's what the jury could have thought, probably thought, did think, about this particular issue, this carve-out language." [Parties nod affirmatively.]

policy limit?

In its entirety, the jury's note astutely stated:

> In reference to number 7, we concluded that the answer was yes due to the expressed exclusion of defense cost in the ISLIC policy. We did not agree that any of the 4 conditions below it as a whole to negate [*sic*] defense costs.

In response, the court and counsel agreed to adjust question seven to read: "Did any Excess Insurance Company, other than ISLIC, prove that its policy does not follow-form to any Liberty obligation to pay defense costs?"[203] Shortly after the jury returned its verdict.[204]

C. Plaintiffs' Verdict

Substantially, the jury returned a Plaintiffs' verdict. The parties' pitted one witness against another on almost every point, and the jury sided with Plaintiffs. The jury found that Liberty's deductibles were "paid through the premium adjustment endorsement," and not on a per-occurrence basis. The jury also found that Viking and Warren's settlements regarding the underlying asbestos claims and Liberty's "lost" policies were reasonable. Additionally, the jury found excess policies following form or containing their own Prior Insurance or Non-Cumulation clause were not intended to erode the aggregate or per-occurrence liability limits.

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[203] *See id.* at 67:13-68:20.
[204] Trans. ID 47753255.

As to defense costs, the jury found that Plaintiffs proved Liberty's obligation to pay under its second layer, umbrella policies, in addition to the policies' indemnity limits. And, once ISLIC was expressly excluded from the question, the jury changed its answer to question seven; Defendants policies' were found to follow Liberty's defense obligations. Although seeming contradictory, and discussed *infra*, the jury answered "yes" to the related question 8, finding that an excess insurer proved that its policy does not follow Liberty's obligation to pay defense costs in addition to the policy limits.

The jury further found that Plaintiffs proved "the past asbestos lawsuits against [Plaintiffs] allege facts that raise the possibility that the underlying claimant suffered bodily injury alleged to be caused" by their products during the excess insurers' policy periods. As to asbestos plaintiffs, the jury determined that the bodily injury "trigger" to coverage occurs "upon cellular and molecular damage caused by asbestos inhalation," for both malignant and non-malignant cases.

The jury found that under the Aetna XN policy, Travelers "is required to pay all sums on account of all accidents or occurrences starting at 'dollar one' once the insured has exhausted the underlying" policy limits. The jury found that Viking proved Granite State, International, and Century were not permitted to pay Warren under a reservation of rights, while also denying Viking coverage. And, the jury

found that Warren failed to prove that replacing its NCC would harm its asbestos defense.

Considering the whole trial, the verdict was not surprising. The evidence was substantial and, for the most part, supports the jury's verdict. That said, and as will be discussed, reading each policy solely within its four corners produces a more narrow, refined holding. Again, in the broad scheme, the verdict was appropriate. But, reading each policy closely and without extrinsic evidence, the verdict must be refined to conform to the policies' unambiguous meaning. Plain language in an insurance policy trumps a jury's hindsight.

VI. Post-Trial

Post-trial, Plaintiffs submitted a Motion for Entry of Final Judgment Order, substantially incorporating the verdict, but including two legal issues for the court's determination: exhaustion and Plaintiffs' right to choose coordinating counsel. Defendants move for judgment as a matter of law regarding non-cumulation clauses, the injury-in-fact trigger, exhaustion, and defense obligations.

A losing party may renew a motion for judgment as a matter of law under Superior Court Civil Rule 50(b).[205] Rule 50(b) does not generate a new trial, rather

[205] Super. Ct. Civ. R. 50(b) reads: "Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

"a verdict is entered in favor of the moving party based upon the same evidence that the verdict for the non-moving party was rendered by the jury."[206] "The Court is always reluctant to take any question of fact from the jury, but should order a directed verdict for the defendant when it clearly appears that, under the law, a verdict for the plaintiff would not be justified."[207]

In considering the Rule 50(b) standard here, it bears repeating that this court expressly declined to decide the parties' summary judgment motions. Accordingly, if the court now decides that a question of fact need not have been put to the jury, the court will not be bound by the verdict on that point.

VII. Conclusions of Law

A. Non-Cumulation Clauses

Defendants argue that "[u]nder New York law, a claim that triggers [prior insurance and non-cumulation clauses] reduces ***both*** the excess policies' per-occurrence and aggregate limits for that claim as well as all subsequent claims." Again, *Viking II* held all sums allocation applied to the excess policies, declaring, as a matter of law, that a pro-rata approach is inconsistent with the policies' non-cumulation and prior-insurance clauses. Defendants' own expert agreed. Reiterating, a pro-rata approach could leave Plaintiff underinsured and required to "pay all the

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[206] *Burgos v. Hickok*, 695 A.2d 1141, 1144 (Del. 1997).

[207] *McCarthy v. Mayor of Wilmington*, 100 A.2d 739, 740 (Del. Super. 1953).

multiple insurers' deductibles [...] in order to get the reduced amount the pro-rata approach leaves to recover."[208]

Reducing the per-occurrence and aggregate limits based upon the policies' non-cumulation and prior insurance clauses breaks the law articulated in *Viking II*. Accordingly, as *Viking II* explains, the non-cumulation and prior insurance clauses at issue reduce only the per-occurrence limits. As such, Carpenter's testimony regarding the deductible application across all policies triggered on a claim is inconsistent with the law of the case. As a matter of law (and consistent with the verdict), the non-cumulation and prior insurance clauses do not erode the policies' per-occurrence liability limits. Regardless of whether the policy is ambiguous or not, Plaintiffs are entitled to judgment that all sums allocation applies to the excess policies.

B. "Injury-in-fact" Trigger

Again, *Viking II* determined, as a matter of law, that the injury-in-fact standard applies to the policies' "bodily injury" trigger for per-occurrence coverage. Although *Viking II* determined that "injury-in-fact" standard, it only touched upon Plaintiffs' evidentiary burden.[209] Post-trial, Defendants argue that Plaintiffs failed to satisfy New York's "bodily injury" standard. According to Defendants, "Plaintiffs

[208] *Viking II*, 2 A.3d at 112.
[209] *See Id.* at 110.

had to prove that a claimant suffered a 'bodily injury' during a policy period," which required evidence demonstrating "actual impairment of a bodily function."

Because Plaintiffs' presented evidence relating to "mere cellular or molecular damage," Defendants argue Plaintiffs, as a matter of law, failed to satisfy New York's "*Keasby*" standard set forth in *Continental Casualty Co. v. Employers Insurance Co. of Wausau*.[210] Specifically, Defendants' argue that *Keasby* requires a plaintiff in an asbestos-related toxic tort case to prove bodily injury by establishing "the point where asbestos fibers overwhelmed the body's defenses' such that 'subclinical tissue damage tips over into actual impairment.'"[211] So, despite Defendants' insistence that trial was unnecessary, the "trigger" issue required fact finding.

Plaintiffs reply that Defendants exaggerate *Keasbey*, which only reconfirmed New York's standard that the "injury-in-fact trigger simply requires an injury during the policy period," and that the triggering injury does not need to "be known, knowable or compensable."[212] Specifically, Plaintiffs argue that "*Keasbey* reaffirms that coverage for asbestos bodily injury claims under products liability coverage is triggered at *the first significant exposure to asbestos*."[213] Thus, Plaintiffs

[210] 871 N.Y.S.2d 48 (N.Y. App. Div. 2008) ("*Keasbey*").
[211] Trans. 49235906 at 14, quoting *Keasbey*, 871 N.Y.S.2d at 54, 63.
[212] Trans. 49866990 at 11.
[213] *Id.* at 13 (emphasis in original).

contend that the jury's finding was consistent with both medical experts' testimony and applicable law. As presented above, [redacted]

[redacted]

[redacted] The court must now decide what New York requires in order to satisfy the injury-in-fact standard, and whether Plaintiffs met their burden of proof.

Courts have specifically held that in New York, injury need not be "diagnosable" or "compensable" during a policy period.[214] The "injury-in-fact" standard "rests on when the injury, sickness, disease or disability actually began."[215] Thus, "a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became diagnosable."[216] As a matter of New York law, therefore, New York accepts dates of substantial exposure as an "injury-in-fact" trigger.[217]

The *Keasbey* asbestos claimants repackaged a product liability claim as one for "non-product, occupational," subject to an insurer's "ongoing operations" coverage with no aggregate limits.[218] *Keasbey* held that plaintiffs had to show an

[214] *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 765 (2d. Cir. 1984).
[215] *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 511 (N.Y. 1993).
[216] *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1194 (2d. Cir. 1995), quoting *Am. Home Productss Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 766 (2d. Cir. 1984).
[217] *See Keasbey*, 871 N.Y.S.2d at 64; *In re Prudential Lines, Inc.*, 158 F.3d 65, 83 (2d Cir. 1998); *see also, Viking II*, 2 A.3d 76, 110 ("New York courts have generally found that a plaintiff who proves that she suffered compensable damage as a result of asbestos exposure is *injured during all periods of material exposure* [....]") (Emphasis added).
[218] *Keasbey*, 871 N.Y.S.2d at 50.

injury exclusively from an asbestos installation project, and plaintiffs' ability to show that "actual injury occurred in the policy period [that also] arose out of an ongoing operation" was "factual[ly] impossib[le.]"[219] Specifically, *Keasbey* held that "recovery under products liability claims is not dependent, as it is here, on the timing of the actual injury nor the particular stage of installation projects at which actual injury may have taken place."[220] Because the "ongoing operations" trigger standard is fundamentally different from products liability, *Keasbey*'s injury-in-fact standard was more rigorous than the asbestos injury-in-fact standard.

Here, the medical testimony was substantially in accord with New York law. The experts tacitly agreed when cellular injury occurs, but differed as to when the body's reaction to the fibers causes an actual "injury."

The jury accepted Plaintiffs' expert's opinion. Interestingly, Defendants contend that an injury occurs at "the point where asbestos fibers overwhelmed the body's defenses such that 'subclinical tissue damage tips over into actual impairment,'" but even their own expert could not define when that would occur.

[219] *Id.* at 64.
[220] *Id.*

Clearly, one expert's definition was clearer and more practical than the other, and the jury accepted it. As to that finding, it is based on more than substantial evidence. Furthermore, it reflects is no miscarriage of justice. Were the definition a matter of law for the court to decide, Defendants' position focuses more on when the disease manifests itself and less on when the disease process began. New York law instructs the fact-finder to determine in hindsight when the disease process first began. As a matter of law and fact, the verdict stands as to injury-in-fact.

C. Exhaustion

Defendants argue that Plaintiffs failed to present evidence proving that the underlying 1980-85 Liberty policies were exhausted, despite the jury's verdict. Defendants rely on Carpenter's testimony relating to the 1980-85 Liberty policies, claiming the policies unambiguously require Plaintiffs to pay a $100,000 deductible on each asbestos claim, "in addition and unrelated to any premium." Defendants further argue Plaintiffs' "assertion that the deductible is relevant only to calculating premiums 'strains the contract language beyond its reasonable and ordinary meaning.'" Defendants assert that under New York's "horizontal exhaustion rule," Plaintiffs' failure to prove the Liberty policies' exhaustion prevents any excess policy from being triggered.

Plaintiffs' argue that the evidence presented at trial supports the jury's

finding that the underlying Liberty policies were exhausted. As to "horizontal versus vertical exhaustion," Plaintiffs rely heavily on *Viking II*'s all sums ruling. Essentially, Plaintiffs equate "all sums" with vertical exhaustion, meaning the insured can pick a year and exhaust that tower before going to another.

Exhaustion, then, requires two things. First, the court must determine whether the underlying Liberty policies have been exhausted, thereby triggering the excess coverage. To decide that, the court must consider the jury's factual finding that the Liberty policies are depleted, which involves reviewing Liberty's deductible policy language, the jury's finding that the deductible acted as a "premium calculation" and not a per-occurrence application, and the finding that the Liberty [redacted] settlement was reasonable. Second, after the Liberty exhaustion issue is decided, the court must decide how the remaining policies are exhausted: vertically or horizontally.

1. Liberty Policies' Exhaustion

The parties agree, as to exhaustion the policies are unambiguous and, therefore, there is no need for extrinsic evidence.[221] Again, Liberty's policies each carry a $100,000 deductible. The Deductible Endorsement reads, in pertinent part and paraphrasing for clarity:

[221] *See, eg., Uniroyal*, 707 F.Supp. 1368, 1373.

> 1. Liberty's obligation applies only to damages and defense costs above a $100,000 deductible of all "personal injury" resulting from any one occurrence.
>
> 2. Liberty shall be liable for an amount equal to the "Personal Injury" and "Each Occurrence" limit stated in the policy minus the applicable deductible (excluding defense costs) under Paragraph 1, and only for the difference between the "Personal Injury" aggregate limits stated in the policy and the deductible damages (excluding allocated loss adjustment expenses) applicable.
>
> 3. Liberty's rights and duties as to defense of suits and Plaintiffs' duties in the event of an occurrence apply irrespective of applying the deductible amount.
>
> 5. Liberty may pay any part of all of the deductible amount to effect settlement and, Plaintiffs shall promptly reimburse Liberty for part of all of the deductible amount paid by Liberty.

Defendants assert that based on Liberty's failure to properly charge and collect a deductible, Plaintiffs, as a matter of law, could not prove that the underlying Liberty policies exhausted. Again, relying on Carpenter's testimony, Defendants' argue that Liberty's $100,000 deductible must be applied to each claim under each policy contributing to the indemnity payment, because each exposure is a separate occurrence. Defendants contend that Liberty is only liable for claims above the $100,000 deductible and below the $500,000 per-occurrence limit. As an example: If Plaintiff settled for $600,000, triggering the 1980-85 primary policies, Plaintiff

would be liable for whole amount due to the $100,000 deductible on each policy, each year that is triggered. Further, Defendants argue that the Liberty policy Premium Endorsement only allows Liberty to collect a "handling fee."

In contrast, Plaintiffs stress that the Premium Endorsement provides that Liberty shall collect a "premium for the expenses of handling deductible losses," and it supplies a formula for calculating premiums based on "deductible amounts incurred." "Deductible amounts incurred" means "all losses and [defense costs] paid by Liberty and reimbursed by Plaintiffs as well as any 'payments made directly by [Plaintiffs] for all losses and [defense costs] falling within the deductible.'"

Plaintiffs argue that Viking and Warren's combined ████ settlement to Liberty satisfied the deductible premium; therefore, Defendants' argument is baseless. Even if Plaintiffs failed to pay the deductible, Plaintiffs allege Liberty is still obligated to indemnify up to the limits, thus exhausting the policies. Plaintiffs (echoing Brigada) claim that insurers reduce indemnity payments by the applicable deductible amount, eroding total limits regardless of whether a deductible is paid. Noting that defense costs count toward deductible satisfaction, Plaintiffs argue that "the question of whether any portion of the amounts paid were true deductibles does not change the fact that those payments count towards the exhaustion of the policy limits, and those payments are sufficient as a matter of law

to exhaust the 1980-85 Liberty primary policies."

An insurance policy's meaning is discerned by reading and considering it as a whole.[222] Insurance policies are construed to effect the parties' intent as expressed by their words and purposes.[223] Like Delaware, New York applies "common speech" and "reasonable expectation and purpose of the ordinary businessman" tests to determine a policy's meaning.[224] If the policy "on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract."[225] The court should not strain to find an ambiguity when the policy's terms have definite and precise meanings.[226] If the policy language is "susceptible of two reasonable interpretations," the policy is ambiguous.[227] If extrinsic evidence is unhelpful, ambiguities are resolved against the insurer.[228]

Again, the parties agree that the deductible language is unambiguous – the parties agreed to a $100,000, off-the-top, per-occurrence deductible. That comes

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[222] *MDW Enterprises, Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 341 (N.Y. App. Div. 2004).
[223] *Am. Home Products Corp. v. Liberty Mut. Ins. Co.*, 565 F.Supp. 1485, 1495 (S.D.N.Y. 1983), *aff'd*, 748 F.2d 760 (2d Cir. 1984).
[224] *MDW Enterprises*, 4 A.D.3d at 340; *see also*, *Appleby v. Chicago Title Ins. Co.*, 80 A.D.3d 546, 549 (N.Y. 2011) ("As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning .... A contract is unambiguous if the language it uses had a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion.").
[225] *Appleby*, 80 A.D.3d at 549.
[226] *See Breed v. Ins. Co. of N. Amer.*, 46 N.Y.2d 351, 355 (N.Y. 1978).
[227] *MDW Enterprises*, 4 A.D.3d at 340-41.
[228] *See Uniroyal, Inc. v. Home Ins. Co.*, 707 F.Supp. 1368, 1374-76 (E.D.N.Y. 1988).

from the clear language of the deductible endorsement's paragraph 1. That said, the endorsement's paragraph 3 requires Liberty and Plaintiffs to fulfill their obligations under the policies, regardless "of the application of the deductible amount." Moreover, paragraph 5 permits Liberty to pay the deductible itself in order to effectuate settlements.

Taking all that into consideration, it is clear that whether or not the deductible was appropriately applied on an actual per-occurrence basis is beside the point; the policy allows the parties to continue the underlying litigation without the complicated per-occurrence deductible payments urged by Defendants. Further, the deductible endorsement clearly permits Liberty to accept the deductible later, which is what the [REDACTED] settlement between Liberty and Plaintiffs represented. And, although Plaintiffs' argument regarding the deductible as a premium calculation is not in accord with the endorsements' language, the deductible endorsement nonetheless permits Liberty to cover the deductible and later seek reimbursement, presumably in the form of a premium payment. As to Liberty's method of collecting the deductible after-the-fact, that was legal. Nothing in the policy prevents it.

Even if that were not so, the jury agreed with Plaintiffs. The jury had an evidentiary basis to find, as it did, that Liberty's deductibles were part of a premium plan, and that Warren and Viking satisfied any outstanding payment, evidence to the

contrary notwithstanding. As it was supported by substantial evidence, there is no basis for overturning the jury's finding as to Liberty's exhaustion. As to the exhaustion of Liberty's policies, because it merely reflects the policies' clear language, the verdict stands.

2. Horizontal Exhaustion

The parties further agree that vertical or horizontal exhaustion presents a purely legal question. Plaintiffs argue for "vertical exhaustion," where once an underlying umbrella policy's limits are depleted, Plaintiffs may tender to the next excess policy, even if other, viable umbrella policies remain. Simply put, vertical exhaustion depletes a single year's tower from the bottom primary policy through all excess policies above. Defendants argue for "horizontal exhaustion," where Plaintiffs must exhaust all limits within each underlying layer before *any* excess policy is triggered. Restated, Defendants argue that Plaintiffs must deplete all primary policies, then all umbrella policies, then all first layer excess policies, and so on.

According to Plaintiffs, horizontal exhaustion is inconsistent with *Viking II*'s all-sums holding. Plaintiffs claim "courts that have adopted the all sums allocation method have repeatedly rejected" horizontal exhaustion, and the law of the case precludes horizontal exhaustion. Plaintiffs rely on *Stonewall Insurance Co. v.*

E.I. duPont de Nemours & Co.'s[229] holding that "[u]nder the all sums approach, [an insured] may choose a single tower of coverage, applicable to a single year, from which to seek indemnity and defense costs."[230] *Stonewall* further holds that "[i]t logically follows that where the parties can confine damage to a single year, then only the insurers participating in a [comprehensive general liability] tower covering *that year* are responsible for responding to that damage."[231]

Defendants argue that New York law supports their position that all underlying policies must be exhausted before an excess policy is triggered. Defendants claim "no conflict exists between the horizontal exhaustion rule and all-sums theory," because "all-sums allows the insured to pick a policy from several that [..] are triggered," but all sums "does not control when the policyholder gets to make its selection."

Defendants are correct: "Under the rule of 'horizontal exhaustion,' all primary policies triggered by the loss must pay to their limits – that is, be exhausted – before any excess insurer will become liable."[232] Even more, "New York courts have consistently found that an umbrella policy is not required to contribute to the payment of a settlement until all other applicable policies have been exhausted

[229] 996 A.2d 1254 (Del. 2010).
[230] *Id.* at 1259.
[231] *Id.* at 1260-1261.
[232] Defts.' Op. Br. 12 (quoting, 3-16 Paul E.B. Glad, et al., Appleman on Insurance § 16.09[2][c](v) (2011)).

[despite policy language]."[233]

Plaintiffs' claim that horizontal exhaustion has been repeatedly rejected with all sums allocation is an overstatement. *Home Insurance* involved all sums allocation and horizontal exhaustion. Importantly, unlike *Stonewall, Home Insurance* is a New York case applying New York law, which governs the excess policies. That is important here, as New York requires each underlying layer to be depleted before an insured can access *any* excess layer.

While there is policy language supporting Plaintiffs' argument for vertical exhaustion,[234] as a matter of law, New York clearly requires each layer's exhaustion before reaching the next. But for New York's law, the court could reject horizontal exhaustion. But, New York law controls here, and as to horizontal versus vertical exhaustion, there is a true conflict. Thus, this court must apply New York law.

Importantly, and despite Plaintiffs' claim, horizontal exhaustion does not conflict with *Viking II* or its all sums holding that an "insured [can] pick a policy and use it up to the policy limits, and leave questions of apportionment to be fought out later among the insurers themselves."[235] In fact, horizontal exhaustion and all sums

[233] *Home Ins. Co., Inc. v. Liberty Mut. Ins. Co.*, 678 F. Supp. 1066, 1069 (S.D.N.Y. 1988); *Am. Home Assur. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 18 (N.Y. 1997).
[234] *See* Pltfs.' Op. Br. 24-27.
[235] *Viking II*, 2 A.3d at 112.

allocation harmonize, each defining different parameters.[236] The insured must exhaust its primary and umbrella insurance layers before tapping the excess. With the underlying layers gone and the excess triggered, the insured then may choose which excess tower will cover a claim's "all sums."

D. Defense Obligations

Again, the parties agree that as to the excess insurers' duty to provide a defense for Plaintiffs -- the insureds – the policies are unambiguous and must be reviewed without considering extrinsic evidence. The parties disagree, however, over which policies follow-form to Liberty and to what extent, if at all, any exclusions preclude an excess insurer from paying for Plaintiffs' defense.

Plaintiffs argue that all excess policies "follow-form" to the typical

[236] 15 Couch on Insurance § 220:27 ("According to many authorities, each insurer whose policy is triggered is jointly and severally liable for damages that occur before, during, and after their particular period."). In observation,

> Courts differ as to how the loss is to be distributed among primary and secondary insurers once joint and several liability is imposed. [....] According to some authorities, the insured must exhaust all available coverage at the same level before turning to coverage which is secondary to that level. This method of allocation has been called "horizontal exhaustion without stacking." Under the horizontal exhaustion without stacking method, the insurer or insurers which pay the loss may then seek contribution in accordance with their "other insurance" provisions from other carriers on the risk for the triggered years. Other authorities allocate the loss based upon a scheme that allows the insureds to stack their coverage, called joint and several allocation with stacking and vertical exhaustion. Under this method, damages may be apportioned among policy years without reference to layering of policies in triggered years.

Liberty policy language, and are obligated to defend the claims against Plaintiffs in the asbestos litigation. Defendants make convoluted arguments, in scattergun fashion, regarding their defense obligations. Generally, Defendants argue that, as a matter of law, only seven excess policies carry defense obligations, and those seven policies' obligations are limited to the policy's applicable limits. Defendants contend that most of the excess policies unambiguously disclaim defense obligations in one of three ways:

> 1. through express exclusions stating that the excess policy does not follow-form specifically with respect to defense obligations;
>
> 2. by defining "loss" to exclude defense costs from coverage;
>
> 3. through "assistance and cooperation" clauses or "consent" clauses giving excess insurers the option, but not the obligation, to pay for defense.[237]

Additionally, Defendants argue that, as a matter of law, some excess policies have no defense obligations because the underlying Liberty policies have no defense obligations. Defendants also argue that the Aetna XN policies only attach after a single "occurrence produces a loss that exceeds [redacted]"

Defendants further break their argument down into seven parts, arguing against any defense obligation or, in the alternative, any defense costs exceeding

[237] Defts.' Op. Br. at 20.

policy limits. First, Defendants argue that several excess policies follow-form as to defense obligations, but differ from Liberty's policies due to carve-outs, such as "[t]his policy is subject to the same terms [...] ***except as otherwise provided herein*** [....]"[238] Second, Defendants contend that eight policies specifically exclude defense obligations.[239] Third, Defendants argue that several excess policies "disclaim any defense obligation by defining 'ultimate net loss' or 'loss' to exclude legal expenses or defense costs."[240] Fourth, Defendants argue that policies containing "assistance and cooperation" clauses "give the insurer the right – but not the obligation – to assume the defense."[241] Fifth, Defendants argue that policies with "consent" clauses "disclaim responsibility to pay defense costs incurred without the [insurer's] consent."[242] Sixth, Defendants contend that any excess policy following form to Liberty does not have defense obligations because Liberty's umbrella policies do not have a duty to pay for an insured's defense.[243] Seventh, Defendants argue those excess policies covering

[238] Defts.' Op. Br. at 20, citing Defts.' Trial Ex. 1487 (Emphasis in original).
[239] Defts.' Op. Br. at 21. These excess policies are: International Nos. 5220113076, 5220282357, and 5220489339; ISLIC No. XSI 5217; California Union No. ZCX003889; INA Nos. XCP145194 and XCP156562; and, Lexington No. 5510143.
[240] *Id.* at 23. These excess policies are: London Nos. K25878, UHL0395, UKL0340, UKL0341, and UKL0342; Lexington Nos. CE5504779, CE5503312, and 5510143.
[241] *Id.* at 24. These excess policies are: London Nos. CX5026, K24961, K25878, UGL0160, UGL0162, UHL0395, UKL0340, UKL0341, and UKL0342; Lexington No. 5510143; California Union No. ZCX003889; INA Nos. XCP145194 and XCP156562; and, International Nos. 5220113076, 5220282357, and 5220489339.
[242] *Id.*
[243] *Id.* at 25. This argument refers to: Puritan No. ML652652; Commercial Union No. CY9502120; Aetna Nos. 06XN194WCA and 06XN243WCA; Fidelity & Casualty No. SRX1889565; Republic No. CDE0835; Vanguard No. CDE1462; and, National Union No.

both indemnification and expenses do so within the policy's limits.[244]

Under New York law, coverage exclusions must be "in clear and unmistakable language."[245] Exclusions cannot "be extended by interpretation or implication, but are to be accorded a strict and narrow construction."[246] Thus, the insurer carries the burden of proving a particular exclusion is "subject to no other reasonable interpretation."[247]

1. Liberty's underlying policy language

Liberty's policies, the underlying insurance, unambiguously contain a duty to defend without eroding policy limits:[248]

> INVESTIGATION, DEFENSE, SETTLEMENT, ASSISTANCE AND COOPERATION
>
> With respect to personal injury [...] covered under this policy (or which would be covered but for the Insured's retention as stated in the declarations), but not covered under any underlying policy or any other Insurance, the company will

9601115.

[244] *Id.* at 26. These policies are: Central National Nos. CNZ141951 and CNZ141989; Century No. CIZ425741; Old Republic No. OZX11405; Lexington No. GC403427; Granite State No. 62790163; and, Puritan No. ML651258.

[245] *MDW Enterprises*, 4 A.D.3d at 340.

[246] *Id.*

[247] *Id.*

[248] *See* Liberty, Policy Nos. LG1-681-004091-042, LG1-681-004091-043, LG1-681-004091-047, LG1-681-004091-049 "Coverage A and B: [Liberty] will pay on behalf of the insured all sums [...] and [Liberty] shall have the right and duty to defend [....]. Supplementary Payments: [Liberty] will pay in addition to [limits] (a) all expenses incurred [....]"

> 1. defend any suit against the Insured seeking damages on account thereof, even if such suit is groundless, false, or fraudulent [...]
>
> 2. pay all expenses incurred by the company, all costs taxed against the Insured in any suit defended by the company and all interest on the entire amount of any judgment therein[...]
>
> 4. pay all reasonable expenses incurred by the Insured at the company's request in assisting the company in the investigation or defense of any claim [....]
>
> and the amounts so incurred; except settlement of claims and suits, are not subject to the insured's retention [...] and are payable by the company in addition to the applicable limit of liability [....][249]

Liberty defines "other Insurance" as "any other valid and collectible insurance (except under an underlying policy) which is available to insured, or would be." The Liberty policies' clear language obligates the insurer to defend and/or pay costs "in addition" to policy limits.

Based on the Liberty policy excerpt above, Defendants argue that the terms "covered" and "not covered" relate to risks and, therefore, the excess insurers are not obligated to pay defense costs. Relying on one New York case, *Pergament Distributers v. Old Republic Insurance*,[250] Defendants contend those terms refer "to whether the policy insures against a certain risk[,] not whether the insured can collect

[249] *See, eg,* Liberty, Policy Nos. LE1-681-004091-803 through 809.
[250] 128 A.D.2d 760 (N.Y. App. Div. 1987).

on an underlying policy."[251] The policy discussed in *Pergament* differs, however, from the Liberty's policies here. *Pergament* examined a policy's language to determine whether an umbrella policy must drop down to provide primary coverage where the primary carrier was insolvent.[252] Moreover, *Pergament*, itself, is limited to the policy "at bar," in that case's context.[253] As such, *Pergament* is not helpful.

Liberty's policies are clear that "covered" and "not covered" refer to payments, or money available. That is reinforced by the policy's qualifying phrase "or which would be covered but for the Insured's retention." The insured's retention, or deductible, in this context, cannot refer to only "a certain risk," as argued by Defendants. The "or which would be covered" retention qualification can only relate to payment. That makes sense because the qualifying language is followed by "but

[251] Defts.' Op. Br. at 26, quoting *Pergament Distribs., Inc. v. Old Republic Ins. Co.*, 128 A.D.2d 760, 761 (N.Y. App. Div. 1987).

[252] The clause examined by *Pergament* was:

> Limit of liability
>
> The Company hereon shall only be liable for the ultimate net loss the excess of either[:]
>
> (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances $1,000,000 or
>
> (b) the amount as set out in item 2(c) of the Declarations $10,000 ultimate net loss in respect of each occurrence not covered by said underlying insurances.

[253] *Pergament Distribs*, 128 A.D.2d at 761.

not covered under any underlying policy or any other insurance," so as to clarify that this policy will not pay out if other "valid and collectible" funds are available.

Even if, *arguendo*, the terms "covered" and "not covered" are ambiguous, though the parties agree they are unambiguous, the jury found that Liberty's umbrella policies carry defense obligations. Moreover, under New York law, ambiguities are construed in the insured's favor.[254] Thus, in the end, under any analysis, the Liberty policies include an unlimited duty to defend.

Most excess policies follow a Liberty policy. Having determined that the Liberty umbrella policies carry defense obligations, the court must decide which and to what extent specific excess policies follow-form. A few are true follow-form policies, meaning the policies adopt Liberty's terms and conditions without reservation. Several others, however, successfully limit defense obligations to within the policy limits.

2. Excess Policies with Full Defense Obligations

a. True follow-form

The court finds a few excess policies truly "follow-form" here. These true follow-form policies mainly contain the declarations page, detailing the liability limits and the underlying insurance, and irrelevant exclusions. Apart from that, the policies in similar ways state: "This policy shall follow the terms, conditions,

[254] *See Breed*, 46 N.Y.2d at 353.

definitions and exclusions of the controlling underlying insurance policy no. TBD issued by Liberty Mutual Insurance Company." These true follow-form policies unambiguously do not have any exceptions or limitations to defense obligations.

The policies unambiguously following Liberty's underlying policy, carrying full defense obligations, in addition to their policy limits, are:

1. Fidelity, Policy No. SRX1889565
2. National Union, Policy No. 9601115
3. Commercial Union, Policy No. CY9502120.

b. Follow-form by endorsement

Other policies include endorsements explicitly altering the original policy language to follow-form.[255] The court notes that these policies are obligated to defend "in addition to" the limits, in accord with the underlying Liberty policy language already discussed. The policies with applicable endorsements are:

1. Republic, Policy No. CDE0835
   Endorsement No.1:

> It is agreed that except only with respect to policy period, premium and limits of liability, this policy is hereby amended to follow all terms, conditions, definitions and exclusions of the first layer umbrella policy, except as

[255] *See Cnty. of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 628 (N.Y. 1994) ("[I]t is settled that in construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect *except as altered by the words of the endorsement*.") (Emphasis added).

noted below and all renewals and replacements thereof. It is further agreed that all pre-printed terms and conditions hereon are deleted to the extent that they vary from or are inconsistent with the terms and conditions of the first layer

2. Vanguard, Policy No. CDE1462
   Endorsement No. 3:

It is agreed that except only with respect to policy period, premium and limits of liability, this policy is hereby amended to follow all the terms, conditions, definitions and exclusions of the first layer umbrella policy, Liberty[] and all renewals and replacements thereof. It is further agreed that all pre-printed terms and conditions herein are deleted to the extent they vary from or are inconsistent with the terms and conditions of the first layer umbrella [...]

3. Puritan, Policy No. ML652652
   Endorsement No. 9:

With the exceptions of endorsements one through ten of this policy, and any subsequent endorsements, coverage as is afforded by this policy shall follow the terms and conditions of [Liberty umbrella][256]

4. Aetna, Policy Nos. 06XN243WCA and 06XN194WCA Excess Overlayer Indemnity Policy, Follow-form Endorsement:

Notwithstanding any provision in this policy to the contrary, the insurance afforded by this policy shall follow the insuring agreement and coverage and is subject to the

[256] The only exceptions made to following-form is based on other, inapplicable endorsements. The related policy indemnifies "for damages [...] and expenses on account of: (I) Personal Injuries [....]" Reading the endorsement in conjunction with the policy's terms, the court does not find any conflicting language that would create a possible ambiguity. Anyway, ambiguities to endorsements are found in favor of the insured. *See Appleby v. Chicago Title Ins. Co.*, 80 A.D.3d 546, 550 (N.Y. 2011). The court finds this policy follows Liberty's obligations.

same warranties, terms, definitions, conditions and other provisions as are contained in the Controlling Insurance.[257]

3. "Coverage" and "Conditions"

Several policies contain "Coverage" and "Conditions" language[258] in identical or similar format:

> COVERAGE
> The company hereby agrees, subject to the limitations, terms, and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability [....]
> for damages, direct or consequential and expenses on account of:
>
> (i) Personal injuries [...]
>
> caused by or arising out of each occurrence [...] and arising out of the hazards covered by and as defined in the Underlying Umbrella [....]
>
> CONDITIONS
> 2. MAINTENANCE OF UNDERLYING UMBRELLA INSURANCE – This policy is subject to the same terms, definitions, exclusions, and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies [....]

The policies with the above language explicitly cover Plaintiffs' "expenses on

[257] This clearly means that Aetna not only has full defense obligations, but also eliminated its "one accident or occurrence" limitation language and subsequently obligated itself to the same per-occurrence indemnity payments as Liberty.

[258] *See* Central National, Nos. CNZ141951 and CNZ141989; Century, No. CIZ425741; First State, Nos. FB000022 and 929817; Granite State, No. 62790163; Old Republic, No. OZX11405; Puritan, Nos. ML651258; Lexington, Nos. GC403427 and CE5503312 (AIG00101-103).

account of," which clearly includes defense costs. It is also clear that the policies cover Plaintiffs' expenses "subject to [the policy's] limitations," meaning aggregate limits. While Coverage only speaks to costs, "Conditions 2" creates a follow-form obligation, thereby filling-in the duty to defend's omission from coverage. Because these policies are otherwise silent as to a duty to defend, concluding that the obligation from Conditions 2 is included is consistent with the policies' other terms.

Having found a duty to defend, Defendants' alternative argument, that the duty is subject to policy limits, is persuasive. Defendants assert if a defense duty exists, it is nevertheless subject to the applicable policy limits because "Coverage" is "subject to the limitations, terms and conditions hereinafter mentioned," and Conditions 2's "except as regards [...] the amounts and limits of liability." The excess policies follow-form, but only within the "amounts and limits of liability."

Plaintiffs argue that Condition 2's "amounts and limits of liability" is only meant to maintain the policy's aggregate limit, and not to limit the insurer's broad duty to defend. That argument is undercut, however, by the "amount and limits" language. "Amounts" and "limits" separately define "liability," to mean "amounts of liability," and "limits of liability." Deconstructing the sentence that way forces the reader to recognize the insurer capped its liability, completely, at the

policy's agreed-to aggregate limits.[259]

This holding is further reinforced by Liberty's own policies, which read defense costs are "in addition to the applicable limit of liability." If an insurer can obligate itself to costs above a policy's limit using that phrase, then these excess policies can limit the same using the "except as regards [...] amounts and limits of liability" language.[260]

Moreover, the parties agreed to "all-or-nothing." While the parties still quibble over the jury's affirmative answer to Question 8, finding defense costs in addition to limits, the parties assured the court they would not rely on the verdict.[261] Whether or not the jury's Question 8 answer was limited to ISLIC does not matter, as Plaintiffs contend, because the policies clearly cap liability in a way that cannot be reasonably interpreted otherwise.[262] Accordingly, policies containing "coverage" and "conditions" language have a duty to defend subject to policy limits.

4. "Assistance and Cooperation"

Certain London policies contain "assistance and cooperation" clauses, including the standard "maintenance of underlying umbrella" clause already discussed.[263] The London policies' pertinent language is:

[259] *But see* Republic Policy No. CDE0835, *supra*.
[260] *See, e.g., Bellefonte Reinsurance Co. v. Aetna Cas. and Sur. Co.*, 903 F.2d 910 (2d Cir. 1990).
[261] *See* n. 198, *supra*.
[262] *MDW Enterprises*, 4 A.D.3d at 340.
[263] *See* London Policy Nos. CX5026, K24961, UGL0160, and UGL0162.

> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify Assured for ultimate net loss [...] for [personal injury damages] arising out of the hazards covered by and as defined in the Underlying [Liberty umbrella policy].
>
> This policy is subject to the same terms, definitions, exclusions and conditions (except as regards [...] the amount and limits of liability and except as otherwise provided herein) as are contained [in Liberty's policy.]
>
> Underwriters shall not be called upon to assume charge of the settlement of [*sic*] defense of any claim made [...] but [...] shall have the right and shall be given the opportunity to associate with the Assured [...] in the defense and control of a claim [...] reasonably likely to involve the Underwriters in which event the [Assured] and the Underwriters shall cooperate in all things in the defense of such claim [...]

These policies fail to define the "ultimate net loss" they cover.

The second quoted paragraph above, the standard "maintenance of underlying umbrella" clause, obligates the insurer to the same extent as Liberty. And, because of the third quoted paragraph above, the coverage obligation includes "defense of any claim." Although the third paragraph excludes insurer's duty to "assume charge" of defense, it contemplates a duty to defend claims against the insureds. Specifically, the exclusion contemplates the defense being provided by another, as it allows the insurer to "associate," or affiliate, with the insured's defense while specifically not requiring the insurer to take charge of it. So, Plaintiffs are

correct that although these policies exclude the obligation to lead Plaintiffs' defense, it does not exclude the duty to defend entirely.

That holding is reinforced by the policies' failure to define "ultimate net loss." With that failure and the policies' silence, there is nothing suggesting that "ultimate net loss" would not include defense costs. The next question, then, is whether these policies defend within, or in addition to, a policy's aggregate limits.

Again, the policies here contain the "maintenance of underlying umbrella" clause, limiting excess costs to within a policy's limit. Like the other policies with the "maintenance of underlying umbrella" clause, the policies here do not specifically mention costs or expenses, or the insurer's responsibility to them. Again, by not defining "ultimate net loss," or otherwise limiting its definition, the clause includes all costs associated with a claim. Because every clause has a purpose and cannot be considered superfluous,[264] combining the "ultimate net loss" and "maintenance of underlying umbrella" clauses, the policy forms the obligation to pay defense costs, but within the applicable policy limits.

5. "Assistance and Cooperation [with] Consent"

A few policies follow-form, but with "consent" and "cooperation" clause

[264] *See Bretton v. Mutual of Omaha Ins. Co.*, 492 N.Y.S.2d 760, 763 (N.Y. App. Div. 1985) (internal citations omitted).

exceptions.[265] The consent and cooperation clauses here are typically drafted together as an explicit exception to following form. The clauses similarly read, in pertinent part, the insurer will follow-form, but:

> shall not be obligated to assume charge of the settlement or defense of any claim [...] brought [...] against the Insured, but [Insurer] shall [...] be given the opportunity to associate with the Insured in the defense or control of any claim [...] with the Insured and the Insurer shall cooperate in all things in the defense or control of such claim [...] but no obligation shall be incurred on behalf of the Insurer without its consent.
>
> The insurance afforded by this certificate shall not apply to any expenses for which insurance is provided by the primary insurance.

Similar to the "assistance and cooperation" clause discussed *supra*, the above clause is clear on its face that the insurers follow-form, but do not have a duty to lead the defense. The insurers retained the right to affiliate with Plaintiffs' defense.

Also clear, however, is that this insurance does not exempt itself from defense costs upon the primary's exhaustion. The "associate" and "consent" clauses are otherwise silent as to defense costs. While the clause clearly states the insurer shall not incur an obligation without its consent, and that its insurance does not cover costs provided by someone else, the policy does not "clearly and unmistakably"

[265] California Union, No. ZCX003889; INA, Nos. XCP156562 and XCP145194; *see also* Lexington Policy No. 5510143 "Company shall pay its incurred costs and such expenses incurred by the insured with approval of the Company."

exclude defense costs, especially after the primary's exhausted.[266] In fact, the clause excluding costs paid by Liberty reinforces the excess insurer's obligation to pay Plaintiffs' costs once its policy is triggered and the underlying policy is no longer paying or covering Plaintiffs' defense.

The "consent" requirement limits the insurer's cost obligation. There is no other way to read "without its consent," other than the literal meaning "without Insurer's permission."[267] Exclusions must be read narrowly, without implication or nonexistent modifiers, and New York courts are generally in accord.[268] That said, any insurer that paid costs, but reserved its rights to contest the obligation, has impliedly consented to Plaintiffs' incurring reasonable defense costs. Both sides implicitly agree that they benefit by defending the underlying claims. Thus, these excess insurers consent to and must cover Plaintiffs' reasonable defense costs.

5. Defined "Ultimate Net Loss"

As to its remaining policies,[269] London asserts that any defense

[266] *See Breed*, 46 N.Y.2d at 353 ("Well recognized is the general rule that ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause.").
[267] *See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1219 (2d Cir. 1995) (With "consent" provisions, "the insurer has no duty to defend or pay costs, but only has the right to do so at its own election.").
[268] *See, e.g., Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 855 N.Y.S.2d 45, 48 (N.Y. 2008) (Finding an insured breached the underlying policy's "consent" provision by settling claims without first notifying and obtaining the insurer's approval.).
[269] London Policy Nos. K25878, UHL0395, UKL0340, UKL0341, UKL0342, and Lexington No. CE5504779.

obligation erodes policy limits based on the policies' "ultimate net loss" definition. These policies contain the typical "Coverage," "Maintenance of Underlying Umbrella," and "Assistance and Cooperation" clauses already discussed. Accordingly, they impose a duty to defend. These policies limit per-occurrence liability to "the full amount of [its] ultimate net loss liability." And, in these policies, "ultimate net loss" is defined:

> the amount payable in settlement of the liability of the Assured after making deductions for all recoveries and for other valid and collectible insurances, excepting [the underlying policy] and shall exclude all expenses and Costs.

The policies further defines "Costs."[270]

The "ultimate net loss" clause on its face excludes costs from its definition. The "ultimate net loss" definition begins with what is included, and ends with "and shall exclude," thereby indicating that whatever follows is exempted from the definition. The unambiguous exclusion of "Costs" from "ultimate net loss" requires a determination as to what exactly "Costs" means.

"Costs" explicitly excludes "legal expenses." Each policy also, however, excludes from "Costs" "all expenses for salaried employees [...] and general retainer fees for counsel normally paid by the Assured." There is no reading of the "Costs"

[270] *See, e.g.*, Lexington No. CE5504779.

definition that considers counsel costs as anything other than legal fees excluded from "ultimate net loss." The policy also clearly contemplates incurred costs, including legal fees, as its "Conditions" section outlines the apportionment of incurred costs. Accordingly, for these policies, insurer must cover defense costs without regard to applicable policy limits.

D. Defense Counsel Selection

[redacted] Defendants argue that they have the right to hire new counsel based on the "assistance and cooperation" clause's language: "the [insurer] shall *have the right* and *be given the opportunity to associate* with the Insured in the defense or *control of any claim* [...]" (Defendants' emphasis). The jury agreed with Defendants.

Where the "insurer and the insured have a potential conflict of interest, the duty to defend includes a duty to provide independent counsel to the insured.[271] New York strips the insurer of its right to choose counsel where "the question of insurance coverage is [...] intertwined with the question of the insured's liability."[272] Specifically, right to choose counsel is eliminated "where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the

[271] *Golotrade Shipping & Chartering, Inc. v. Travelers Indem. Co.*, 706 F. Supp. 214, 219 (S.D.N.Y. 1989).
[272] *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 401-02 (N.Y. 1981).

insurer would require that he defeat liability only upon grounds which would render the insurer liable."[273]

Defendants' incorrectly rely on the "assistance and cooperation" clause's language as the end-all for choosing counsel. Nowhere do the clause nor the policies otherwise mention choosing counsel or otherwise detail the process. Despite Defendants' emphasis on the "assistance and cooperation" clause, the clause says that the insurer has the right to associate, affiliate, or assist the insured with its defense or claim. Stated another way, the insured cannot freeze-out its insurer from the underlying litigation against the insured, not if it expects indemnification.

This litigation's history reinforces the court's unwillingness to let Defendants have any say over Plaintiffs' defense to underlying claims. Defendants have fought their insureds at every turn, including questioning the insured's actual liability in the underlying asbestos claims.[274] While it is obvious that the insureds and their insurers share the common goal of limiting the insureds' liability for asbestos-related damages, that is where their mutual interest ends.

VIII.

For the above reasons, the jury's verdict: is upheld as to "trigger" based upon *Keasbey*'s inapplicability; is upheld as to Aetna policies' application; overruled

[273] *Id.* at 401 n.*.
[274] *See* Defense witness Edward Hugo's testimony.

as to Plaintiffs' right to choose NCC; and clarified as to Defendants' specific defense obligations, holding that: (1) policies SRX1889565, 9601115, CY9502120, CDE0835, CDE1462, ML52652, 06XN243WCA, 06XN194WCA, K25878, UHL0395, UKL0340, UKL0341, UKL0342, and CE5504779 all follow-form, carrying full defense obligations in addition to policy limits; and (2) policies CNZ141951, CNZ141989, CIZ425741, FB000022, 929817, 62790163, OZX11405, ML651258, GC403427, CE5503312, CX5026, K24961, UGL0160, UGL0162, ZCX003889, XCP156562, XCP145194, and 5510143 carry defense obligations within the policy's applicable limits. Additionally, horizontal exhaustion applies to each underlying layer before the excess carriers are triggered. The court will enter an order upon submission, after approval as to form.