IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CONDUENT STATE HEALTHCARE, LLC, f/k/a XEROX STATE HEALTHCARE, LLC, f/k/a ACS STATE HEALTHCARE, LLC,	)	
Plaintiff,	)	C.A. No. N18C-12-074 MMJ [CCLD]
v.	)	
AIG SPECIALTY INSURANCE COMPANY f/k/a CHARTIS SPECIALTY INSURANCE COMPANY, *et al.*,	)	
Defendants.	)	

Submitted: March 26, 2021
Decided: June 23, 2021

On Plaintiff's Motion for Summary Judgment
GRANTED IN PART and DENIED IN PART

On Defendants' Motion for Partial Summary Judgment to Determine Choice of Law
GRANTED

On Defendants' Motion for Partial Summary Judgement as to the Duty to Defend and Indemnify
DENIED

On Defendant QBE Specialty Insurance Company's Motion for Summary Judgement
GRANTED

On Excess Insurer Defendants' Motion for Summary Judgment as to Endorsement 34
GRANTED

OPINION

Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, Delaware, Robin L. Cohen, Esq., Keith McKenna, Esq. (Argued), Cohen Ziffer Frenchman & McKenna LLP, New York, New York, *Attorneys for Plaintiff Conduent State Healthcare, LLC*.

John L. Reed, Esq., Peter H. Kyle, Esq., DLA Piper LLP, Wilmington, Delaware, Robert S. Harrell, Esq. (Argued), Mayer Brown LLP, Houston, Texas, *Attorneys for Defendants AIG Specialty Insurance Company and Lexington Insurance Company*.

Alanna Clair, Esq. (Argued), Dentons US LLP, Washington, D.C., *Attorneys for Defendants Aspen Specialty Insurance Company, Indian Harbor Insurance Company, and StarStone Specialty Insurance Company*.

Ronald P. Schiller, Esq. (Argued), Daniel J. Layden, Esq., Katelyn L. Mays, Esq., Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, Pennsylvania, *Attorneys for Defendant Navigators Specialty Insurance Company.*

Robert J. Katzenstein, Esq., Smith, Katzenstein & Jenkins LLP, Wilmington, Delaware, *Attorneys for Defendants ACE American Insurance Company, Aspen Specialty Insurance Company, General Security Indemnity Company of Arizona, Indian Harbor Insurance Company, Ironshore Specialty Insurance Company, Navigators Specialty Insurance Company, and Starstone Specialty Insurance Company.*

Matthew P. Donelson, Esq., Kent & McBride, P.C., Wilmington, Delaware, Julianna Ryan, Esq., Andrew E. Oldis, Esq. (Argued), Patrick Stoltz, Esq., Matthew E. Mawby, Esq., Kaufman Borgeest & Ryan LLP, Valhalla, New York, *Attorneys for Defendant QBE Specialty Insurance Company*.

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Parties

This is an insurance coverage dispute. Plaintiff Conduent State Healthcare, LLC ("Conduent")[1] is a Delaware corporation with its principal place of business in New Jersey. Conduent is an insured party, and the defendants are Conduent's insurers.

Defendant AIG Specialty Insurance Company ("AIG") is an Illinois corporation with its principal place of business in New York. Defendant ACE American Insurance Company ("ACE") is a Pennsylvania corporation with its principal place of business in Pennsylvania. Defendant Ironshore Specialty Insurance Company ("Ironshore") is an Arizona corporation with its principal place of business in New York. Defendant Aspen Specialty Insurance Company ("Aspen") is a North Dakota corporation with its principal place of business in Connecticut. Defendant Indian Harbor Insurance Company ("Indian Harbor") is a Delaware corporation with its principal place of business in Connecticut. Defendant General Security Indemnity Company of Arizona ("GSINDA") is an Arizona corporation with its principal place of business in New York. Defendant Navigators Specialty Insurance Company ("Navigators") is a New York corporation with its principal place of business in New York. Defendant StarStone Specialty Insurance Company ("StarStone") is a

[1] Conduent formerly was known as Xerox State Healthcare, LLC, which in turn formerly was known as ACS State Healthcare, LLC. For ease, "Conduent" refers to the company as it is named now and its predecessors.

Delaware corporation with its principal place of business in New Jersey. Defendant QBE Specialty Insurance Company ("QBE") is a North Dakota corporation with its principal place of business in New York. Defendant Lexington Insurance Company ("Lexington") is a Delaware corporation with its principal place of business in Massachusetts.

Conduent's Insurance Policies

AIG issued Conduent an insurance policy effective from May 26, 2012 to May 26, 2013 (the "Primary Policy"). Excess-layer insurance policies that covered the same period were issued by ACE, Ironshore, Aspen, Indian Harbor, GSINDA, Navigators, StarStone, QBE, and Lexington (collectively, the "Excess Policies" and the "Excess Insurers"). The Primary Policy includes an endorsement stating that the policy provides retroactive coverage for events that took place after 1992. The parties dispute whether this retroactive date applies to the Primary Policy *and* Excess Policies or only to the Primary Policy.

The Medicaid-Related Claims

In 2003 and 2010, Conduent entered into agreements with the Texas Health and Human Services Commission (HHSC) whereby Conduent agreed to perform administrative services for Texas' Medicaid program. Specifically, Conduent would process Medicaid claims, including authorization requests from orthodontic providers.

In June 2012, the State of Texas issued a Civil Investigation Demand (CID) to Conduent that sought information about Conduent's role in allegedly helping orthodontic providers overbill for services. Conduent incurred legal fees and expenses by responding to the CID. Conduent notified AIG of the CID in 2012. AIG took the position that the CID did not constitute a claim under the Primary Policy. However, AIG considered the CID a "notice of circumstance" which meant that any later claims relating to or arising out of Conduent's actions processing Medicaid claims would fall under the 2012-13 policy year.

In 2014, several orthodontic providers filed suit against Conduent (the "Provider Actions"). Certain providers had obtained payment for services that the State sued to recover. The providers in turn sued Conduent for a variety of claims including fraud, breach of the contract, and misapplication of fiduciary property. In total, there have been five Provider Actions filed against Conduent

In May 2014, the HHSC terminated its contract with Conduent. The same month, Texas brought a suit against Conduent under the Texas Medicaid Fraud Prevention Act (the "State Action"). Texas originally sought civil remedies and injunctive relief. Texas' claim later was amended via its Third Amended Petition to include breach of contract and negligence claims. To resolve the dispute, Texas and Conduent entered into a Settlement Agreement. Under the terms of the Settlement Agreement, Conduent agreed to pay Texas $235,942,000.00. This amount includes

Texas' losses and attorneys' fees. The CID, Provider Actions, and State Action together constitute the "Medicaid-Related Claims."

Procedural History

Conduent sought indemnification from Defendants for the fees, expenses, and settlement amount incurred as a result of the Medicaid-Related Claims. Defendants denied all of Conduent's claims under the respective insurance policies. Conduent filed suit in this Court on December 10, 2018. On March 20, 2019, Conduent filed its First Amended and Supplemented Complaint. Conduent asserts the following claims: (1) breach of contract against AIG; (2) breach of contract against the Excess Insurers; and (3) anticipatory breach of contract against the Excess Insurers. Additionally, Conduent requests declaratory relief against all Defendants. On February 7, 2019, Navigators raised a Counterclaim in its Response to the Complaint seeking declaratory judgment that coverage is barred or limited.

On April 8, 2019, AIG and Lexington filed a Rule 12(b)(6) Partial Motion to Dismiss. The Court denied the motion in a written opinion dated June 24, 2019.[2] AIG and Lexington filed a Motion for Reargument on July 1, 2019. That motion was denied on July 25, 2019.

Pending before this Court are a number of motions: (1) Defendants' Motion for Partial Summary Judgment to Determine Choice of Law; (2) Conduent's Motion for

[2] *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2019 WL 2612829, at *1 (Del. Super.).

Summary Judgment; (3) Defendants' Motion for Partial Summary Judgment as to the Duty to Defend and Indemnify; (4) QBE's Motion for Summary Judgment; and (5) Excess Insurer Defendants' Motion for Summary Judgment as to Endorsement 34. All of these motions were filed on December 22, 2020. The Court heard oral argument on March 26, 2021.

STANDARD OF REVIEW

Summary Judgment Standard

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[3] All facts are viewed in a light most favorable to the non-moving party.[4] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[5] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[6] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[7]

[3] Super. Ct. Civ. R. 56(c).
[4] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[5] Super. Ct. Civ. R. 56(c).
[6] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Insurance Interpretation Standards

The proper interpretation of an insurance policy is a question of law.[8] Policies should be read as a whole.[9] Terms are given their plain and ordinary meaning.[10] Where the terms are unambiguous, "a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[11] Coverage provisions are to be read broadly while exclusion provisions should be read narrowly.[12]

ANALYSIS

Choice of law

Neither the Primary Policy nor the Excess Policies contain any choice of law provisions. Before the Court can interpret and apply the policies, it first must determine which state's laws apply. The laws of Delaware, Connecticut, or New York possibly could govern the disputes in this case.

In a choice-of-law analysis, the Court first must determine whether there are any actual conflicts between the laws of the proposed jurisdictions.[13] If there are no conflicts, the analysis stops there.[14] However, if there are conflicts, the Court must

[8] *Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, 51 A.3d 442, 446 (Del. 2012).
[9] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 90 (Del. Ch. 2009), *aff'd*, 148 A.3d 633 (Del. 2016).
[10] *Id.*
[11] *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982).
[12] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *13 (Del. Super.).
[13] *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015).
[14] *Id.*

complete a conflict-of-law analysis.[15] For insurance contracts in particular, the Court follows a two-step approach when resolving conflicts. First, the Court should follow Restatement (Second) of Conflict of Laws § 193 and apply the laws of the state "which the parties understood was to be the principal location of the insured risk during the term of the policy."[16] If there is no principal location of risk, the Court should determine which state has the most substantial relationship to the case by considering the following factors found in Restatement (Second) of Conflict of Laws § 188: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties."[17]

After reviewing the laws of Delaware, Connecticut, and New York, the Court finds that there are no conflicts related to insurance contract interpretation standards or duty to defend standards. However, conflicts exist between the jurisdictions relating to the standards for the duty to indemnify and public policy defenses. Therefore, the Court will conduct a conflict-of-laws analysis.

The Delaware Supreme Court previously has found that Section 193 "does not rigidly" apply to multistate insurance programs.[18] The Supreme Court noted that

[15] *Id.*
[16] Restatement (Second) of Conflict of Laws § 193.
[17] *Id.* § 188.
[18] *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 466 (Del. 2017).

Comment B to Section 193 "mak[es] the point that the importance of the location of the insured risk has 'less significance' when 'the policy covers a group of risks that are scattered throughout two or more states.'"[19] The Primary Policy and Excess Policies in this case covered a variety risks located in a variety of jurisdictions. Therefore, the Court finds that there is no principal location of risk under Section 193.

Turning next to the "most substantial relationship test" under Section 188, the Court finds that the factors balance in favor of the application of New York law. The final bound policies were requested from New York offices and sent to New York offices. The policy negotiations took place in New York. The lead brokers for the policies were located in New York. Performance took place in New York because the premium payments were sent to New York banks from New York banks. New York is location of the most Conduent employees. New York is the principal place of business for the Primary Insurer and four Excess Insurers. Finally, Xerox, Conduent's predecessor and the named insured under the policies, was incorporated in New York. Therefore, the Court finds that New York has the most substantial relationship to this case. New York law governs the disputes regarding duties to defend and indemnify, and public policy defenses.

[19] *Id.*

Duty to Defend and Indemnify

Defendants argue that they owe no duties to Conduent stemming from the State Action. Defendants rely on the Fines and Penalties Exclusion contained in the Primary Policy. Defendants contend that the First and Second Amended Petitions from the State Action fall under this exclusion because the cause of action arose under the TMFPA, which only provides for civil penalties. Defendants further assert that the Third Amended Petition, which included claims for breach of contract and negligence, should be disregarded for purposes of determining coverage because Texas never intended to litigate the additional claims.

Conduent argues that Defendants' duty to defend is broad and was triggered by the CID. Conduent further argues that each of the State Action petitions alleged liability that was based on conduct that would be covered under the policies. Finally, the Conduent emphasizes that the Settlement does not include any "penalties." The Settlement only includes compensation for Texas' losses and attorneys' fees.

Two provisions from the Primary Policy are relevant to this issue. First, the general coverage provision states that "The Insurer shall pay on an Insured's behalf all Loss in excess of the applicable Retention that such Insured is legally obligated to pay resulting from a Claim alleging a Wrongful Act." The Policy defines "Claim" as: "(1) a written demand for money, services, non-monetary relief or injunctive relief; or (2) a Suit."

Second, the Fines and Penalties Exclusion provides:

> The policy shall not cover Loss in connection with a Claim made against an Insured . . .
>
> (j) for any of the following . . .
>
> (6) civil or criminal fines or penalties imposed by law against an Insured and any matters deemed uninsurable under the law pursuant to which this policy shall be construed.

As this Court held in its prior decision, Defendants' duty to defend is broad and is triggered "whenever a complaint against [Conduent], read as a whole and with all reasonable inferences made in light most favorable to the policyholder, alleges facts that potentially fall within the scope of coverage."[20] The State Action clearly related to the same conduct at issue in the CID and the Provider actions. Therefore, it would have been reasonable to infer that Texas might bring additional claims seeking more than just civil penalties.

The Court finds that the statements contained in any iteration of Texas' petition are Claims that allege "wrongful acts" that could have fallen under the policy's coverage. Defendants cannot rely on the sole fact that Texas' claims were based on the TMFPA to justify the decision to not defend against the State Action. The same is true for the duty to indemnify. The Settlement Agreement does not include any fines or penalties. The terms only allow Texas to recover its losses and attorneys'

[20] *Conduent*, 2019 WL 2612829, at *5.

fees. Therefore, the Fines and Penalties Exclusion does not apply to defense costs for the State Action or to the settlement.

The Court finds that Defendants have a duty to defend against the Medicaid-Related Claims. Conduent has established a *prima facie* case that Defendants have a duty to indemnify.

Affirmative Defenses to Indemnification

Defendants have raised a number of affirmative defenses negating their duty to indemnify Conduent for the State Action settlement. First, Defendants argue that the insurance policies do not cover civil penalties, such as those assessed by the TMFPA. Second, Defendants contend that allowing Conduent to pass its loss on to insurers would violate public policy. Third, Defendants assert that Conduent breached the terms of the policies by settling without first receiving consent from Defendants. Fourth, Defendants allege that the settlement agreement was the result of collusion and fraud.

Defenses with no Genuine Issues of Material Fact

There are no genuine issues of material fact related to Defendants' first two defenses. These defenses may be ruled on as a matter of law. As discussed above, defendants' argument based on the Fines and Penalties exclusion fails.

As to the second affirmative defense, Defendants contend that public policy bars insured entities from recovering fines or penalties from insurance carriers. In

J.P. Morgan Securities Inc. v. Vigilant Insurance Co.,[21] the New York Supreme Court Appellate Division stated:

> To allow a wrongdoer to pass on its loss emanating from the [uncovered] disgorgement payment to the insurer, thereby shielding the wrongdoer from the consequences of its deliberate malfeasance, undermines this goal and 'violate[s] the fundamental principle that no one should be permitted to take advantage of his own wrong.'[22]

The Court need not determine whether it would violate public policy for Conduent to receive coverage for penalties. It is irrelevant whether the State Action sought civil penalties, what matters is what the settlement *actually includes*. There were no civil penalties included in the Settlement Agreement. Thus, Defendants' indemnification of Conduent would not violate public policy against coverage for penalties. Therefore, Defendants' second affirmative defense fails.

Defenses with Genuine Issues of Material Fact

As to Defendants' third and fourth affirmative defenses, a number of necessary facts are disputed. Defendants allege that the claims for breach of contract and negligence in the Third Amended Petition were included for the sole purpose of securing insurance coverage. Defendants further argue that the settlement reached in the State action was the result of collusion or fraud. Conduent disputes these allegations. For example, while Defendants point to testimony that Texas never intended to litigate the Third Amended Petition, Conduent points to different

[21] 84 N.Y.S.3d 436 (N.Y. App. Div. 2018).
[22] *Id.* at 441 (quoting *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 664 (N.Y. 2000)).

testimony from Texas that the claims included in that petition were "strong and well-grounded." Defendants argue that Conduent required Texas to file the Third Amended Petition as a condition of the Settlement Agreement, and for the sole purpose of obtaining insurance coverage. Conduent counters that it had legitimate business reasons for including that requirement.

The parties also have differing views on Conduent's requirement to cooperate with the Defendants and obtain their consent before agreeing to any settlement. Defendants contend that Conduent never provided draft versions of the Settlement Agreement. Defendants further allege that Conduent misrepresented material facts in the settlement process, which Conduent denies. Conduent additionally counters that it notified Defendants of all offers that it received from Texas, even though it was not required to.

Considering the record and the parties' arguments, the Court finds that genuine issues of material fact prevent summary judgment on whether: (1) the State Action settlement was the result of collusion or fraud; and (2) Conduent breached the policies' cooperation and consent provisions. These affirmative defenses may be raised at trial.

QBE Policy Prior and Pending Date Exclusion

The Excess Policy issued by QBE provides:

> It is hereby agreed that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against the Insured based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any demand, investigation, administrative or regulatory proceeding, litigation or suit commenced on or before the Pending or Prior Date listed below [May 26, 2012].

QBE has moved for summary judgment arguing that the Pending and Prior Exclusion quoted above (P&P Exclusion) means that the Medicaid-Related Claims are not covered by the policy it issued to Conduent. In response, Conduent argues that the P&P Exclusion does not apply to the facts of the case.

The applicability of the P&P Exclusion turns on whether or not the Medicaid-Related Claims are based on or arise out of any demands, investigations, or administrative proceedings that commenced prior to May 26, 2012. The Court finds the following undisputed facts in the record particularly relevant:

- In August 2008, Texas' HHSC Office of the Inspector General ("OIG") "conducted an audit of [Conduent's] performance";
- The report following the audit states that "prior authorization staff approved prior authorization requests that were not in compliance with the Texas Medicaid Providers Procedures Manual" and Conduent "could be approving a portion of orthodontic [provider] requests that are not [eligible for Medicaid]";
- On November 24, 2008, the Texas Office of the Attorney General, Medicaid Fraud Control Unit, wrote to the HHSC-OIG expressing concerns that

Conduent might be failing to properly evaluate prior authorization requests before approving them;

- On April 16, 2009, the HHSC issued a State Action Request ("SAR") to Conduent demanding additional information about Conduent's prior authorization procedures;
- On April 16, 2009, an internal Conduent email states that the SAR "is possibly an allegation of breach of contract for dental authorizations and Medicaid fraud";
- On April 16, 2009, another internal Conduent email states "Fraud on our part? Did [the HHSC] give an example of what they think is fraud? Is it based on their audit last fall?"

The Court finds that the undisputed facts demonstrate that demands and investigations began prior to May 26, 2012. These investigations concern the same actions at issue in the Medicaid-Related Claims—how Conduent processed and approved prior authorization requests. Therefore, the clear and unambiguous terms of the P&P Exclusion apply the Medicaid-Related Claims. Summary judgment is hereby granted in favor of QBE.

Endorsement 34

On or around September 5, 2014, the Primary Policy was amended through an endorsement. Endorsement 34 states that the continuity date for the policy will be retroactively extended back to 1992. The endorsement also amends the definition of

"Subsidiary" as applied to Conduent and its predecessor ACS. It is undisputed that AIG agreed to issue Endorsement 34. It is also undisputed that Conduent did not communicate with the Excess Insurers when the endorsement was issued or seek their approval to the terms of the endorsement. Finally, it cannot be disputed that Endorsement 34 was issued after the 2012-13 policies had expired.

The Excess Insurers argue that they cannot be bound by Endorsement 34 because the terms of their respective policies prevent them from being bound by post-policy changes that were made without consent or prior agreement. In response, Conduent argues that the Excess Insurers are bound by Endorsement 34 because it is a reformation based on a mutual mistake.

Courts have held that a reformation to a primary policy can be binding on excess insurers who follow form.[23] However, courts also have found that "a general 'follow form' provision does not override the express [] terms set forth in the excess policy."[24] In light of existing precedent, it appears that reformations to a primary policy can bind excess policies that follow form only where there are no conflicting

[23] *See Great Atl. Ins. Co. v. Liberty Mut. Ins. Co.*, 773 F.2d 976, 980-81 (8th Cir. 1985) (holding that reformation of an error in the primary policy is binding on excess insurer who followed form); *L.E. Myers Co. v. Harbor Ins. Co.*, 394 N.E.2d 1200, 1202-04 (Ill. 1979) (same); *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 881 P.2d 1020, 1026-27 (Wash. 1994) (finding that excess insurer is bound by retroactive endorsement made to primary policy).

[24] *Jin Ming Cheng v. Ins. Co. of the State of Pa.*, 36 N.Y.3d 133, 141-42 (N.Y. App. Div. 2020). *See also, Playtex FP, Inc. v. Columbia Casualty Co.*, 622 A.2d 1074, 1080 (Del. Super. 1992) (rejecting plaintiff's argument that the limits of liability section in the primary policy binds the excess policy that followed form because the excess policy expressly excludes limits of liability); *Republic Ins. Co. v. North American Phillips Corp.*, 1991 WL 35617, at *4 (Conn. Super.) (finding that the operative terms of a primary policy would be incorporated into an excess policy that followed form except for those terms expressly excluded by the follow form provision).

express terms in the excess policies. Therefore, the Court must turn to the provisions in the respective insurance policies to determine whether any provisions prevent Endorsement 34 from binding the Excess Insurers.

- Ironshore's policy states: "If during the Policy Period or any Discovery Period the terms, conditions, exclusions or limitations of the Followed Policy are changed in any manner, the Insureds shall as a condition precedent to their rights to coverage under this policy give to the Insurer written notice of the full particulars thereof and secure the Insurers affirmative consent to such modification before coverage will be effective."
- GSINDA's policy states: "Any modification under the Controlling Underlying Insurance Policy must be agreed in writing by an Officer of GSINDA" and "this insurance will follow the terms and conditions of the policy number Controlling Underlying Insurance Policy in effect at the inception date of this policy."
- Starstone's policy states: "This Policy shall become subject to any such change that expands or broadens coverage only if and to the extent the Insurer agrees to such change in writing" and "[t]his Policy, except as stated herein, is subject to all the terms, conditions, representations, limitations and restrictions contained in the Followed Policy as of the inception date of this Policy."

- QBE's policy states: "[T]he coverage under this Policy shall become subject to such change only if and to the extent the Insurer consents to such change by written endorsement to this Policy."
- Aspen's policy states: "This Policy shall provide [coverage] . . . in accordance with the same terms, conditions, exclusions and limitations of the Followed Policy … as they existed on the inception date of this Policy."

The language at issue in the excess policies is clear and unambiguous. Therefore, the Court will give the words their plain and ordinary meanings.[25] Whether Endorsement 34 reflects a "reformation" or an "amendment" is irrelevant, what matters is whether Endorsement 34 "changed" or "modified" any of the terms in the Primary Policy. It is not disputed, and indeed could not be disputed, that Endorsement 34 changed the continuity date and definition of a subsidiary. It does not matter if these changes were made to "fix an error," the effect remains the same that the changes modified the terms of the Primary Policy. While it may be true that Endorsement 34 "merely reformed the controlling Primary Policy so that its coverage matched the bargained-for intent" of AIG and Conduent, it does not follow that it reflects the bargained-for intent of *all of the parties* as Conduent claims.

The clear and unambiguous terms of the excess policies shows that the bargained-for intent of the Excess Insurers was to provide coverage as reflected in the

[25] *Viking*, 2 A.3d at 90.

Primary Policy ***on May 26, 2012***. The Excess Policies also show that the bargained-for intent of the Excess Insurers was that any changes made to the Primary Policy—fixing errors or otherwise—would not be binding unless the Excess Insurers were notified of the changes and provided consent. If Conduent wished for Endorsement 34 to be binding on the Excess Insurers, it could have circulated the endorsement and sought approval from the other parties. Conduent chose not to do so and cannot now attempt to bind the Excess Insurers to changes that occurred well after the policies expired. Therefore, Defendants' Motion for Summary Judgment as to Endorsement 34 is granted.[26]

CONCLUSION

The Court finds that New York has the most substantial relationship to the case. Therefore, the laws of New York govern disputes regarding the duties to defend and indemnify, and public policy defenses. The Court also finds that Defendants had a broad duty to defend against the Medicaid-Related Claims. Defense costs incurred by Conduent as a result of the Medicaid-Related Claims are covered. The Fines and Penalties exclusion does not apply. Indemnification is not barred by public policy.

The Court finds that Conduent has made a *prima facie* showing that the Defendants have a duty to indemnify Conduent. However, there are genuine issues of material fact about whether the settlement was reached as a result of fraud or

[26] This ruling only applies to the defendants that joined in the motion. It does not apply to AIG or Lexington.

collusion and whether Conduent breached its duty to cooperate with Defendants. Therefore, the Court cannot grant summary judgment to either Conduent or Defendants with respect to the issue of indemnification for the settlement.

The Court further finds that the Pending & Prior Exclusion contained in the excess policy issued by QBE applies to the Medicaid-Related Claims and resolves QBE of any duties arising from the policy. Finally, the Court finds that Endorsement 34 is not binding on Defendants QBE, Aspen, GSINDA, Indian Harbor, Ironshore, Navigators, StarStone, or Ace because the unambiguous terms of the respective Excess Policies required Conduent to obtain consent or approval for any changes or modifications to the Primary Policy.

THEREFORE, Defendant's Motion for Partial Summary Judgment to Determine Choice of Law is hereby **GRANTED.** Conduent's Motion for Summary Judgement is hereby **GRANTED IN PART and DENIED IN PART.** Defendants' Motion for Partial Summary Judgment as to the Duty to Defend and Indemnify is hereby **DENIED.** Defendant QBE Specialty Insurance Company's Motion for Summary Judgement is hereby **GRANTED.** Excess Insurer Defendants' Motion for Summary Judgement as to Endorsement 34 is hereby **GRANTED.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston