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

CHARLES A. BROWN,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 02C-06-196 RRC
	)	
v.	)	
	)	
THE CHURCH INSURANCE CO.,	)	
HARLEYSVILLE INSURANCE CO.,	)	
and	)	
NATIONAL UNION FIRE	)	
INSURANCE CO. OF PITTSBURGH,	)	
	)	
Defendants.	)	

Submitted: December 29, 2004
Decided: March 24, 2005

Upon Defendant The Church Insurance Co.'s
Motion for Summary Judgment. **DENIED.**

Upon Defendant Harleysville Insurance Co.'s
Motion for Summary Judgment. **GRANTED in part and DENIED in part.**

Upon Defendant National Union Fire Insurance Co. of Pittsburgh's
Motion for Summary Judgment. **GRANTED.**

MEMORANDUM OPINION

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Daniel A. Griffith, Esquire, Marshall, Dennehay, Warner, Coleman & Coggin, Wilmington, Delaware Attorney for The Church Insurance Co.

Stephen P. Casarino, Esquire, Casarino, Christman & Shalk, Wilmington, Delaware, Wilmington, Delaware, Attorney for Harleysville Insurance Co.

Anthony G. Flynn, Esquire and Timothy Jay Houseal, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, Delaware and John C. Sullivan, Esquire, Post & Schell, P.C., Philadelphia Pennsylvania, Attorneys for National Fire Union Insurance Co. of Pittsburgh.

COOCH, J.

I. INTRODUCTION

The Church Insurance Co. ("Church") has moved for summary judgment against Harleysville Insurance Co. ("Harleysville"), insurer of Capital Management Co. ("Capital"), on the grounds that Capital is not entitled to coverage by Church in connection with a serious injury suffered by plaintiff under the policy of Cathedral Community Services, Inc. ("Cathedral") because Capital allegedly failed to comply with the notice provisions to Church of the Church insurance policy. Harleysville has moved for summary judgment against Church on the grounds that Capital was an insured under Cathedral's policy with Church and that the Church policy provides primary coverage and, in addition, that Church had a duty to defend Capital. Harleysville also moved for summary judgment against defendant National Union Fire Insurance Co. of Pittsburgh ("National Union") on the grounds that Harleysville's insurance policy issued to Capital is excess to the Nation Union policy issued to Church. National Union has moved for summary judgment against Harleysville on the grounds that its policy issued to Church is an "umbrella" policy and is excess to any "primary" insurance policy.

II. SUMMARY OF THE UNDERLYING LITIGATION

The relevant facts[1] of the separate but related litigation underlying this current lawsuit are as follows. "On June 1, 1994, Cathedral entered into a written contract with Capital, whereby Capital agreed to manage and maintain certain properties owned by Cathedral."[2] These properties included 2001 N. Market Street, where Brown was injured.[3] "Although the written contract expired in 1995, Capital continued to manage Cathedral's propert[ies].[4]" At trial, the jury found that even after that contract had expired, "Capital had agreed to assume the duty to maintain the exterior of 2001 N. Market Street and…the Wilmington City Code required [Capital] to maintain the fire escape [for Cathedral]."[5]

On August 23, 1999, the plaintiff, Charles Brown, was standing underneath an exterior fire escape attached to the side of 2001 N. Market Street. Brown touched the bottom step of the fire escape ladder, and the ladder section fell striking Brown on the head. He suffered a compound,

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[1] The parties agree that there are no material facts in dispute in this subsequent litigation. The pertinent facts are stated as needed elsewhere in this opinion.

[2] *Capital Mgmt. Co. v. Brown,* 813 A.2d 1094, 1095 (Del. 2003).

[3] *Capital Mgmt. Co.,* 813 A.2d at 1095-96.

[4] *Capital Mgmt. Co.,* 813 A.2d at 1096.

[5] *Capital Mgmt. Co.,* 813 A.2d at 1098.

comminuted, depressed skull fracture. The ladder section fell because a supporting metal cable, which was severely corroded, broke, releasing the ladder and a counterweight.

On October 21, 1999, Brown filed a personal injury action against Cathedral and Capital. Capital answered the complaint, and asserted a cross-claim against Cathedral for contribution and indemnification. Brown ultimately settled his claim for $525,000 against Cathedral and signed a joint tortfeasor release. Although Capital continued to maintain its cross-claim against Cathedral, Cathedral chose not to contest the cross-claim, and ceased participating in the litigation. The case went to trial on September 10, 2001.

On September 14, 2001, the jury returned a verdict in favor of Brown. The jury apportioned liability 60% against Capital and 40% against Cathedral, and awarded Brown damages in the amount of $2,250,000.[6]

After post-trial discovery on the coverage issues raised by this motion, the parties filed these motions for summery judgment. Plaintiff has settled his claims against all defendants.

[6] *Brown v. Church Ins. Co. et. al.*, Del. Super., C.A. 99C-10-210, Cooch, J. (Nov. 17, 2003) (ORDER).

III. STANDARD OF REVIEW

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[7] The Court must view the facts in a light most favorable to the non-moving party.[8] In a case involving cross motions for summary judgment, the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions.[9] Here, the parties agree that there are no material facts in dispute.

IV. NATIONAL UNION'S MOTION FOR SUMMARY JUDGMENT AGAINST HARLEYSVILLE

A. Contentions of the Parties.

1. National Union's argument in support of its motion for summary judgment against Harleysville.

National Union argues that its policy issued to Church was a "Commercial Umbrella Policy" that provided excess umbrella liability coverage of $50 million

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[7] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56 (Del. 1991).

[8] *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99-100 (Del. 1992).

[9] *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, 642 A.2d 820, 824 (Del. Super. 1993) (holding that the parties implicitly concede the non-existence of factual disputes upon their filing of cross motions for summary judgment); *see Marra v. Wilson*, 2003 Del. Super. LEXIS 63 (holding that where there were cross-motions for summary judgment the parties implicitly conceded the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions).

per occurrence in excess of the $1 million primary liability policy issued by Church to Cathedral.[10] National Union also argues that Harleysville's policy issued to Capital is also a primary policy, subject to provisions that make it excess only to other primary policies and excess to an umbrella policy like National Union's policy.[11] National Union contends that its policy issued to Church was not triggered until after both the Church primary policy and the Harleysville excess policy had been exhausted. National Union argues that because the remaining amount of the judgment awarded to Brown is $1.35 million and the combined remaining policy limits of Church and Harleysville is $1.475 million dollars, there can be no obligation of liability flowing to National Union.[12]

2. Harleysville's response to National Union's motion for summary judgment.

Harleysville argues in response that "National Union ignores the two endorsements to the Harleysville policy which touch upon this subject matter."[13]

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[10] National Union Fire Insurance Company of Pittsburgh, Pa's Memorandum of Law in Support of Its Motion for Summary Judgment at 4 (hereinafter "National Union Sum. J. Memo. at _".).

[11] National Union Sum. J. Memo. at 13-19.

[12] National Union Sum. J. Memo. at 2. The Church policy and the Harleysville policy each had a $1 million dollar policy limit. The total amount of the jury award was $2.25 million dollars. Cathedral was found liable for 40% of the award or $900,000 (which is reduced to the $525,000 that Brown had settled his claim with Cathedral before trial). Capital was found to be 60% liable for $1.35 million dollars. Because Church is not obligated to pay any further amounts due to Cathedral's liability, the remaining judgment is $1.35 million.

[13] Harleysville's Response to National Union Fire Insurance Company's Motion for

Harleysville contends that either one of the two endorsements in its policy with Capital render Harleysville an excess carrier to any other available policy, i.e., the National Union policy. Harleysville argues that pursuant to the language in the "Amendment of Other Insurance Condition Occurrence Version" endorsement, which states that "the Harleysville policy is excess over any other primary insurance when the insured has been added as an additional insured by endorsement," Harleysville is excess coverage over National Union.[14] Harleysville also argues that pursuant to the language in the "Real Estate Property Managed" endorsement that "if the insured is a real estate manager [such as Capital Management Company] then Harleysville's policy is excess over any other valid and collectible insurance."[15]

B. The Harleysville policy issued to Capital is not an excess coverage policy in relation to the National Union umbrella policy issued to Church.

The language of the insurance policy determines the nature and extent of the coverage afforded to an insured.[16] The interpretation of a contract, including an insurance contract, is a question of law to be decided

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Summary Judgment at ¶ 1 (hereinafter "Harleysville's Resp. at _.").

[14] Harleysville's Resp. at ¶ 2.

[15] Harleysville's Resp. at ¶ 3.

[16] *Continental Ins. Co. v. Burr,* 706 A.2d 499, 500 (Del. 1998).

by the Court.[17] Generally, an insurance policy is construed to give effect to the plain meaning of all of the provisions in the policy.[18] Delaware courts have consistently held that an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive.[19] Contracts are to be interpreted in a way that does not render any provisions "illusory or meaningless."[20]

The "Amendment of Other Insurance Condition Occurrence Version" endorsement contained in the Harleysville policy states that Harleysville is excess coverage over "any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."[21] The language of this amendment envisions a scenario where the Harleysville insured is acting in a capacity where other primary insurance is available and the Harleysville insured is

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[17] *Home Insurance Co. v. American Insurance Group*, 2003 Del. Super. LEXIS 370 *14.

[18] *Home Insurance Co.*, 2003 Del. Super. LEXIS 370 *14.

[19] *O'Brien v. Progressive Northern Insurance Co.,* 785 A.2d 281, 288 (Del. 2001).

[20] *O'Brien,* 785 A.2d at 288.

[21] National Union Fire's Motion for Summary Judgment at Exhibit J (hereinafter "National Union Mot. for Sum. J. at _".).

entitled to make a claim under that other primary insurance by virtue of the Harleysville insured having been added to the other primary insurance as an additional insured. The policy language specifically requires the Harleysville insured to have been added by attachment of an endorsement.

As correctly argued by National Union, the National Union policy is not a primary policy but is an umbrella or excess policy. The language of this amendment in the Harleysville policy does not contemplate the Harleysville policy being principally an umbrella policy like the National Union policy, but rather an excess carrier only when an insured has been added to another primary policy. In other words, the Harleysville policy transformed from a primary policy, which it was principally intended to be, to an excess policy when Capital was added to another primary policy. Also, Capital, as pointed out by National Union, was not added by an attachment of an endorsement to the Church policy; therefore, the condition precedent in the Harleysville policy [that Capital must be added as a named insured to another primary policy] was not met in order to trigger the amendment.

Additionally, the "Real Estate Property Managed" amendment states that Harleysville's policy "is excess over any other valid and collectible insurance available to [the insured]."[22] Harleysville's reading of this amendment would

[22] National Union Mot. for Sum. J. at Exhibit J.

create a situation in which a primary insurance policy (the Capital/Harleysville policy) would become a de facto umbrella policy. As stated previously, the Harleysville policy was principally intended to be an excess policy when Capital had been added to another primary policy. The real estate management amendment, in essence, just states a second situation in which Harleysville's policy becomes excess coverage in relation to other primary coverage. As argued by National Union, to permit the real estate management amendment to convert the Harleysville policy into a commercial umbrella policy would be inconsistent with the intent of the Harleysville policy, which is to be principally a primary policy, as well as inconsistent with other provisions of the Harleysville policy. Further, this interpretation of the real estate management amendment would nullify specifically issued commercial umbrella policies, like the National Union, because these umbrella policies would be overwritten by amendments like the real estate management amendment in the Harleysville policy.

C. Conclusion

For the foregoing reasons, National Union's motion for summary judgment against Harleysville is **GRANTED.**

V. CHURCH'S MOTION FOR SUMMARY JUDGMENT AGAINST HARLEYSVILLE AND HARLEYSVILLE'S CROSS MOTION FOR SUMMARY JUDGMENT AGAINST CHURCH

A. Facts pertinent to the Church and Harleysville cross motions for summary judgment.

Charles Brown was injured on August 13, 1999. On August 23, 1999, Capital notified Church of the accident.[23] Subsequent to the notice of the accident by Capital, Cathedral, Church's named insured, also notified Church of the claim and requested a defense and indemnity.[24] Church assigned Crawford & Company to investigate the claim and Church further assigned defense counsel to defend the litigation on behalf of Cathedral.[25]

Capital notified its primary insurer, Harleysville, of the accident on January 31, 2000.[26] After an investigation by the claims adjuster, Harleysville referred the defense of the claim to outside counsel.[27] Harleysville was told by Capital that the building owner (Cathedral) was self-insured.[28] Harleysville was aware that if Cathedral had outside

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[23] Church Insurance Company's Mot. for Sum. J., Exhibit C (Deposition of Michael Lindgren) at 15-16.

[24] Church Mot. for Sum. J. at 4.

[25] *Id.*

[26] Church Mot. for Sum. J., Exhibit D (Adjuster Remarks for Claim S0-010295) at 1.

[27] *Id.*

[28] *Id.*

insurance coverage, then its insured (Capital) would be potentially covered under that policy.[29] Harleysville also discussed, internally, the possibility of either an indemnity agreement in the contract Capital had with Cathedral or "demanding [that] the owner defend [Capital]."[30] Harleysville also initially believed that it had limited or no exposure.[31]

Church settled Brown's claim against Cathedral pursuant to mediation just prior to trial of the underlying litigation that was held in August 2001. Harleysville, in a September 6, 2001 letter, asked Church if Capital was "named as an additional insured" under the Church policy pursuant to a requirement contained in the expired management contract between Cathedral and Capital.[32] Church replied that Capital was not "named as an additional insured."[33] It does not appear that Harleysville inquired of Church as to Capital's potential status as an insured under the Church policy prior to September 6, 2001.[34] It also appears from the record that Church was technically correct that Capital was not a "named insured" (although Capital

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[29] Church Mot. for Sum. J., Exhibit D (Adjuster Remarks for Claim S0-010295) at 1.

[30] *Id.*

[31] *Id.*

[32] Harleysville's Mot. for Sum. J., Exhibit N (9/6/01 Letter of Tracy A. Burleigh, Esq. to Michael Lindren).

[33] *Id.*

[34] *Id.*

was potentially eligible for coverage under the real estate manager provision of the Church policy). On September 7, 2001, just three days before trial, Harleysville apparently decided that the Church policy would provide coverage to Capital as an additional insured and Harleysville made a demand to defend of Church.[35] Church refused the demand to defend submitted by Harleysville.

B. Contentions of the Parties.

1. Church's argument in support of its motion for summary judgment.

Church argues that because Capital failed to comply with the notice provisions of the Church policy issued to Cathedral, Capital is not entitled to coverage under the Church policy. Church contends that under the terms of its policy with Cathedral, Capital, as an additional insured, was obligated to notify Church, "as soon as practicable," if Capital sought coverage under Cathedral's insurance policy with Church.[36] Church argues that Capital's tender of defense to Church days before the underlying trial was to begin was a breach of the notice provision and should disqualify Capital from coverage under the Church policy.

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[35] Church Mot. for Sum. J., Exhibit D (Adjuster Remarks for Claim S0-010295) at 10.

[36] Church Mot. for Sum. J. at 8.

2. Harleysville's response to Church's argument for summary judgment and its argument in support of its cross-motion for summary judgment.[37]

Harleysville responds that (i) Church was given proper notice of the claim and (ii) Capital was not obligated to provide notice to Church because Capital did not know that it was insured under the Church policy. Harleysville argues that Church received notice of the loss from its insured, Cathedral, and that Church was able to conduct a prompt investigation of the claim based on that notice.[38] Harleysville contends that Capital should be excused for any late notice because it did not know that it was an insured under the policy.[39]

Harleysville also filed a cross motion for summary judgment against Church which seeks, in part, a declaration that Capital was an insured under the Church policy, that the Church policy provides primary coverage and that Church had the duty to defend Capital. Harleysville argues that under the Church policy an "insured" includes "[a]ny person or organization while acting as real estate manger for the Named Insured" and the relationship

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[37] The plaintiff Charles A. Brown also filed a response in opposition to Church's motion for summary judgment; however, subsequent to Brown's response, a mediation was held in which the insurance companies settled with Brown. Mediation Settlement Letter of October 13, 2004.

[38] Harleysville's Response to Church's Motion for Summary Judgment at ¶ 6 (hereinafter "Harleysville's Response to Church's Mot. for Sum. J. at _.").

[39] *Id.*

between Cathedral and Capital was one of property owner and real estate manager.

Harleysville further argues that the Church policy is the primary insurance and that Harleysville is an excess policy to Church and National Union.[40] Harleysville contends that either one of two endorsements in its policy with Capital render Harleysville an excess carrier to the Church policy. Harleysville argues that pursuant to the language in the "Amendment of Other Insurance Condition Occurrence Version" endorsement, which states that "the Harleysville policy is excess over any other primary insurance when the insured has been added as an additional insured by endorsement," Harleysville is excess coverage over Church.[41] Harleysville also argues that pursuant to the language in the "Real Estate Property Managed" endorsement that "if the insured is a real estate manager then Harleysville's policy is excess over any other valid and collectible insurance" and Capital was the property manager.[42]

3. Church's response to Harleysville's cross-motion for summary judgment.

Church responds that Capital was required to obtain insurance

[40] As this Court held in part IV of this opinion, National Union's motion for summary judgment has been granted, the Court holding that National Union's umbrella policy issued to Church was in excess of the Harleysville policy.

[41] Harleysville's Mot. for Sum. J. at 9, 10.

[42] *Id.* at 10.

coverage in Cathedral's name and to have itself named as an additional insured.[43] Church argues that because Harleysville knew that Capital should have been named as an additional insured under any policy procured by Capital (but issued in Cathedral's name pursuant to the management agreement) then Harleysville should have known that Capital would have been named as an additional insured under any policies obtained by Cathedral.[44] Church argues that if Capital was unaware that it was included as an additional insured it was because Church was not required to obtain coverage and to include Capital in that coverage.[45] Church also argues that to allow the "boilerplate" provision included in the Church policy, which grants coverage generally to a real estate manager, would be to benefit Capital for not fulfilling its obligations under the real estate management contract to obtain insurance in Cathedral's name.[46]

In addition, Church argues that Capital waived any right that it had to require Church to defend when Capital belatedly tendered its defense to

[43] Church's Answering Brief at 6.

[44] *Id.*

[45] *Id.* at 7.

[46] *Id.*

Harleysville, which was Capital's primary insurer.[47] Church contends that Capital had decided to "knowingly forego" Church's assistance in defending itself and instead decided to rely on Harleysville to defend it.[48] Church argues that the "tender rule" for notice, which is advocated by Capital, contains an exception to the duty to defend that is triggered when an insured "properly tenders [its] defense . . . to another co-insurer or primary insurer."[49]

C. Church had a right and a duty to indemnify and to defend Capital; however, the duty to defend (but not to indemnify) Capital was waived by Harleysville when it undertook the defense of Capital and did not tender a defense to Church until immediately before trial.

At the outset, this Court notes that neither insurance company, Church nor Harleysville, handled the claim or their respective insureds in an ideal manner. The post-judgment litigation in the instant case could have been avoided by better initial communication between the parties and their insureds, and with each other.

The Church and Harleysville motions for summary judgment, among other arguments, present four related arguments as to the relationship, rights and duties between Church and Capital. First, Harleysville is seeking

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[47] Church's Answering Brief at 8.

[48] *Id.*

[49] *Id.*

summary judgment that Capital was an additional insured under the Church policy issued to Cathedral. Second, Church is seeking summary judgment that Capital is not entitled to coverage under the Church policy because Capital failed to comply with the notice provisions in the Church policy. Third, Harleysville is seeking summary judgment that the Church policy is the primary coverage and Harleysville is excess coverage. Fourth, Harleysville is seeking summary judgment that Church had the duty to defend Capital as an additional insured under the Church policy.

The Church policy states in "Section II – Liability Coverage" that "'Insured' means . . . any person or organization while acting as real estate manager for the named Insured." As the Delaware Supreme Court held in *Capital Management v. Brown*, Capital acted as the real estate manager for the Cathedral property at which Charles Brown was injured. Church argues that this Court should not enforce the "boilerplate" language in its own policy extending coverage to a real estate manager because extending coverage to Capital would accrue a benefit to Capital that Capital does not deserve because Capital did not fulfil its obligation to obtain insurance coverage for Cathedral. The policy issued by Church was a Commercial General Liability policy and Church knew or should have known that it was, in part, providing liability insurance for the buildings owned by Cathedral. Church cannot claim that a provision in its policy, that Church drafted and

presumably negotiated with Cathedral, should be ignored as "boilerplate." There is no justification to support Church's argument that part of the definition of "Insured" should be considered mere "boilerplate"; therefore, this Court holds that Capital was an additional insured under the clear language of the Church policy.

Church's motion for summary judgment is based, in large part, upon Capital's alleged failure to comply with the notice provisions contained in the Church policy.[50] Church was entitled to notice of an occurrence, claim, or suit by or for the insured as a condition precedent to Church providing coverage. However, the policy does not require notice from all insureds or from a potential insured. A secondary source states that "[w]here an insurer receives proper and timely notice of [an] accident from the named insured including particulars sufficient to identify the additional insured, it is not necessary that another notice be given by the additional insured."[51] This Court finds that this rule is in accord with the purpose of the notice

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[50] The Church policy states:

> **INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT:**
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> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place, circumstances therefore, and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable. Appendix to Harleysville's Motion for Summary Judgment at Exhibit A.

[51] 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3D §187:12 (1999).

requirement.[52] Further, there have been no allegations ever from Church that notice of loss as to Cathedral was insufficient. Church knew or should have known from the investigation it performed that Capital was the real estate manager and was potentially an additional insured under the Cathedral policy. This Court holds that as to notice of loss, Capital was not required to give additional notice to Church because the notice requirement was fulfilled when Cathedral notified Church of the Brown's claim and requested indemnity.[53]

Harleysville is seeking summary judgment that its policy issued to Capital is an excess policy over the Church policy and that Church is the primary insurer. Church has conceded that "[i]f there is coverage under the [Church] policy, it would be primary to the Harleysville policy."[54] In addition, the language of the Harleysville policy in the "Real Estate Property Managed" endorsement states that "[w]ith respect to your liability arising out of your management of property for which you are acting as real estate manager this insurance is excess over any other valid and collectible

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[52] "The purpose of the notice of loss is to afford the insure an adequate opportunity to investigate, to prevent fraud and imposition upon it, to form an intelligent estimate of its rights and liabilities before it is obligated to pay." 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3D §186:14 (1999).

[53] Church Mot. for Sum. J. at 4.

[54] Harleysville's Mot. for Sum. J., Exhibit N (9/6/01 Letter of Tracy A. Burleigh, Esq. to Michael Lindren).

insurance available to you."[55] This Court holds that the Church policy is "other valid and collectible insurance available to [Capital]," thereby making the Harleysville policy excess in relationship to the Church policy.

Harleysville is seeking summary judgment that Church had a duty to defend Capital in the underlying suit. This Court recently pointed out in *Home Insurance Co. v. American Insurance Group* that the Delaware Supreme Court has never decided what type of notice must be given to trigger the duty to defend.[56] In *Home Insurance Co*, this Court discussed the two prevailing views of what type of notice triggers the duty to defend, the Michigan rule and the New Hampshire rule. The Michigan rule involves a two-part test in which the insurer must receive notice of the claim and a request from the insured for assistance in defending the claim.[57] The New Hampshire rule requires only that the insured has put the insurer on notice of the claim and thereby implicitly tendering the defense."[58] In *White Mountain Cable Construction Corp. v. Transamerica Insurance Co.* the

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[55] Appendix to Harleysville's Mot. for Sum J., Exhibit B (Harleysville's Commercial General Liability policy).

[56] *Home Insurance Co. v. American Insurance Group*, 2003 Del. Super. LEXIS 370 *12 (holding that "[t]he Delaware Supreme Court has never decided what type of notice must be given to trigger the duty to defend . . . [while] [o]ther jurisdictions are divided on the issue").

[57] *Home Insurance Co.*, 2003 Del. Super. LEXIS 370 *14.

[58] *Home Insurance Co.*, 2003 Del. Super. LEXIS 370 *12.

New Hampshire Supreme Court said that it had adopted the notice only rule because

> [s]uch an approach discourages the insurer, usually in a position of superior bargaining power, from defaulting in the performance of its duty to defend. Further, it puts the burden of ensuring clear communication between the insurer and insured on the insurer, who is better positioned, in terms of expertise and resources, to manage such a task.[59]

This Court now adopts the New Hampshire rule that requires only notice to the insurer to trigger the duty to defend, and notes with approval the New Hampshire Supreme Court's reasoning in *White Mountain Cable*. As the New Hampshire Supreme Court noted, there may be special circumstance where the actions of the insured will negate the insurer's duty to defend such as when an insurer properly tenders the defense to another co-insurer or primary insurer,[60] but those special circumstances are not present here.

In *Cincinnati Companies v. West American Ins. Co*. the Illinois Supreme Court held that in order to waive its right to be defended an insured must "knowingly decide against"[61] the insurer's assistance by instructing the

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[59] *White Mountain Cable Construction Corp. v. Transamerica Insurance Co.*, 631 A.2d 907, 910 (N.H. 1993).

[60] *White Mountain Cable Construction Corp.*, 631 A.2d at 910 (N.H. 1993).

[61] *Cincinnati Companies v. West American Ins. Co.*, 701 N.E. 2d 499, 505 (Ill. 1998) (holding that "the better rule is one which allows actual notice of a claim to trigger the insurer's duty to defend, irrespective of the level of the insured's sophistication, except where the insured has knowingly forgone the insurer's assistance").

insurer not to involve itself in the litigation.[62] Where there is more than one available insurance policy and the insured has not tendered a defense uncertainty may arise as to whether the silence should be considered a waiver or not. The Illinois Supreme Court held that "[w]here the insurer has actual notice of a claim against its insured, it would not be required to interpret the insured's silence as a desire for assistance. [Citation omitted]. Rather, the insurer can simply ask the insured if the insurer's involvement is desired, thus eliminating any uncertainty on the question."[63] The duty placed on an insurer (to ascertain the insured's preference whether to be defended or not by the insurer) is one that may be satisfied by a "simple letter to the insured requesting clarification."[64]

Capital did not formally tender its defense to Church until right before trial was to begin in the underlying case; however, the notice of loss to Church triggered its duty to potentially defend.[65] Initially, Capital tendered its defense to Harleysville, it own primary insurer, prior to Church receiving notice of the claim. It appears that from this point onward until Harleysville

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[62] *Cincinnati Companies v. West American Ins. Co.*, 701 N.E. 2d 499, 504 (Ill. 1998).

[63] *Cincinnati Companies*, 701 N.E. 2d at 504 (Ill. 1998).

[64] *Cincinnati Companies*, 701 N.E. 2d at 505 (Ill. 1998).

[65] The Illinois Supreme Court held that when the duty to defend is triggered by notice to the insurer, the insurer is "only potentially liable at this stage" depending on the insurer's investigation of the claim and whether the occurrence falls within the terms of the

formally tendered Capital's defense to Church that neither Church nor Capital discussed with each other their respective duties or rights.

As is true in the instant case, "[w]hen the insured has both primary and excess coverage, the primary insurer is generally obligated to provide the complete defense to the insured."[66] Therefore, a duty to defend provision not only creates an obligation on the part of the insured but vests a right in the insurer to "afford the insurer certain rights in regard to exercising control over the defense."[67] Even though the primary insurer "possess control over the conduct of the litigation and settlement negotiations . . . the excess carrier, like the insured, may become liable for a judgment in excess of the primary insurer's policy limits."[68]

The excess insurer owes a duty to its primary insured as well as to the primary insurer. If the excess insurer's policy contains a duty to defend provision, the excess insurer may still have a duty to defend the insured, even if the primary insurer defended the insured.[69] The excess insurer initially has an identical position as the insured because it is to the excess

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insurance contract. *Cincinnati Companies*, 701 N.E. 2d at 504 (Ill. 1998).

[66] Eric Mills Holmes, Holmes' Appleman on Insurance 2d §136.10[B] (2003).

[67] Robert E. Keeton & Alan I. Widiss Insurance Law §9.1(b) (1988).

[68] Appleman on Insurance 2d §136.10[B] (2003).

[69] Appleman on Insurance 2d §136.10[B] (2003).

insurer's benefit to have the claim settle within the primary insurer's policy limits. Therefore, the excess insurer "owes the primary [insurer] the contractual duty of cooperation and the common-law duty to mitigate damages."[70] An excess insurer "may be liable to the primary insurer for a portion of the excess loss sustained by the original insured when the excess insurer participates in the settlement negotiations and declines a settlement within the policy limits under circumstances indicating bad faith."[71]

This Court holds that as an insurer under the Church policy issued to Cathedral, Church had a duty to defend Capital. Capital had a right to be defended or to "knowingly" waive that defense. Capital tendered its defense to Harleysville, presumably because it did not know that it was an additional insured under the Church policy, and before Church had become involved in the claim, at which point it cannot be said that Capital "knowingly" waived its right to a defense from Church. Harleysville, as Capital's primary insurer, had a duty to defend Capital and as an excess insurer relative to the Church policy, a potential liability to Church for any excess coverage incurred by Church. After Harleysville became aware of Church's involvement in the action it was incumbent upon Harleysville to determine

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[70] Appleman on Insurance 2d §136.10[B] (2003).

[71] Appleman on Insurance 2d §136.10[B] (2003).

what rights Capital may have had under the Church policy.

Even though silence by an insured is not a waiver of the right to a defense, by not determining Capital's rights under the Church policy and by conducting the pre-trial defense of Capital, Harleysville waived Capital's right to a defense by Church. Church was arguably entitled to interpret Harleysville's actions as a waiver of the right to a defense; however, Church as the primary insured had a duty to indemnify both Cathedral and Capital up to Church's policy limits. Knowing that Harleysville was conducting a defense of Capital, Church had a duty to contact Harleysville to clarify Capital's intentions and determine whether Harleysville was defending Capital in Harleysville's capacity as the primary insurer of Capital or as the excess insurer.

This Court holds that Church, as the primary insurer for Cathedral and Capital, is responsible for the amount of the judgment up to Church's policy limits as well as the resulting post-judgment interest on that amount. Because Harleysville waived Church's duty to defend Capital, Church is responsible only for the defense cost associated with its defense of Cathedral (including the post-trial costs associated with the case at bar) and does not have to reimburse Harleysville for its defense of Capital. Harleysville as the excess insurer is responsible for the amount of the judgment that exceeds the

policy limits of the Church policy and the resulting post-judgment interest on that amount. Having waived Capital's right to a defense from Church, Harleysville is responsible for the defense cost associated with its defense of Capital (including the post-trial costs associated with the case at bar) and does not have a right to be reimbursed for defense costs from Church.

D. Conclusion

For the foregoing reasons Church's motion for summary judgment to declare Capital ineligible for coverage under Church's policy issued to Cathedral is **DENIED**; Harleysville's motion for summary judgment to declare Capital an insured under the Church policy and that the Church policy provides primary coverage is **GRANTED**; Harleysville's motion for summary judgment to declare that Church had the duty to defend Capital as an additional insured and that the Harleysville's policy is excess to National Union's policy is **DENIED.**

IT IS SO ORDERED.

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oc: Prothonotary