EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL A. D'AMELIO, Plaintiff and Counterclaim Defendant v. FEDERAL INSURANCE COMPANY and CHUBB CUSTOM INSURANCE COMPANY, Defendants and Counterclaim Plaintiffs v. JEZEBEL MANAGEMENT CORPORATION, JMC VENTURE PARTNERS, LLC, and MOUNTAINVIEW REALTY CORPORATION Additional Counterclaim Defendants	Civil Action No.: 02-12174-PBS

FEDERAL INSURANCE COMPANY'S AND CHUBB CUSTOM INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Introduction

The defendants, Federal Insurance Company ("Federal") and Chubb Custom Insurance Company ("Chubb Custom"), submit this brief in opposition to plaintiff Michael D'Amelio's Motion for Partial Summary Judgment. In his Memorandum in support of his motion ("Pl. Memo"), D'Amelio seeks summary judgment on two issues. The first issue is whether the D&O Policy, as a matter of law, provides coverage for losses D'Amelio contends he sustained in defending and settling the counterclaims brought by ITW against him and the other shareholders of TACC. The second issue is whether the shareholders' release of their contingent interest in the escrow in partial settlement of the ITW litigation, as a matter of law, constitutes an insurable

Loss[1] under the D&O Policy and the R&W Policy. D'Amelio is not entitled to summary judgment on either issue.

Federal and Chubb Custom[2] have addressed the first issue in their own Motion for Partial Summary Judgment. In their memorandum in support of that motion, they have demonstrated that the D&O Policy, by its plain terms, does not cover any of the losses that D'Amelio allegedly sustained in defending the underlying ITW litigation. *See* Federal's and Chubb Custom's Memorandum in Support of Their Motion for Partial Summary Judgment ("Def. Memo"). As further explained below, D'Amelio's argument that the D&O Policy was triggered is based on a tortured and unsupportable reading of the language of the D&O Policy and the R&W Policy. *See*, Pt. I. A, *infra*. The Court should accord the policies their plain meaning, deny D'Amelio's motion for partial summary judgment on this issue, and enter summary judgment for Federal and Chubb Custom.

With respect to the second issue, a fair reading of the facts reveals that the TACC shareholders, including D'Amelio, never had more than a contingent interest in the escrow funds. Because D'Amelio was never entitled to a share of the escrow he was never "legally obligated to pay" those funds to ITW or anyone else. Because D'Amelio was not "legally obligated to pay" the funds, as a matter of law they do not constitute an insurable Loss under either the D&O

[1] When terms such as Insured Capacity, Loss, Insured Person, and Claim are used as defined in the R&W or D&O policies, they are capitalized in this memorandum.

[2] In his memorandum in support of his Motion for Partial Summary Judgment and his Concise Statement of Material Facts in Support of his Motion for Partial Summary Judgment, plaintiff Michael D'Amelio ("D'Amelio") repeatedly refers to the defendants collectively as "Chubb," "Chubb Group," or the "Chubb Group of Insurance Companies." There is no material dispute that the terms "Chubb Group" and the "Chubb Group of Insurance Companies" are trade styles and are not legal entities. By contrast, D'Amelio's references to "Chubb" are simply a shorthand for Federal and Chubb Custom. There is no dispute that Federal and Chubb Custom are the only defendants in this case, are separate entities, and issued separate insurance policies to D'Amelio.

Policy or the R&W Policy. At best, D'Amelio may argue that there are genuine issues of fact concerning whether he and the other stockholders were entitled to the escrow despite TACC's not having met the earnings requirements under the Stock Purchase Agreement; that the escrow funds were D'Amelio's to "pay"; whether the shareholders' release of the escrow constitutes a "payment" made by D'Amelio; and whether D'Amelio ever became "legally obligated" to pay the funds. Because there are disputed issues of fact, D'Amelio's motion on this issue should be denied as well.

Argument

I. THE D&O POLICY DOES NOT COVER ANY OF D'AMELIO'S CLAIMED LOSSES.

A. The Claims Are Not Asserted Against D'Amelio in his Insured Capacity as an Officer or Director of TACC.

D'Amelio advances the untenable argument that the D&O Policy must provide coverage for his defense of ITW's counterclaims, else the "primary-secondary relationship" of the D&O Policy and R&W Policy is rendered "illusory." Pl. Memo at 10-14. D'Amelio fundamentally misconstrues the plain language of the D&O Policy and the R&W Policy and the circumstances under which the D&O Policy operates as primary to the R&W Policy. The D&O Policy and the R&W Policy work together coherently to provide the coverage purchased by D'Amelio, coverage which is substantive, substantial, and anything but "illusory."

Under Massachusetts law, if a D&O policy's terms are "plainly and definitely expressed," the policy must be enforced in accordance with its terms. *High Voltage Engineering Corp.* v. *Federal Ins. Co.*, 981 F.2d 596, 598 (1st Cir. 1992). As Federal and Chubb Custom have demonstrated in their memorandum in support of their own Motion for Partial Summary Judgment, under the plain terms of Endorsement 2 to the R&W Policy – the provision of the R&W Policy that explains the relationship of the two policies – the D&O Policy serves as

primary coverage and the R&W Policy serves as excess coverage only where the two policies independently cover the same Loss. *See* Def. Memo at 15; Affidavit of Dan Bailey ("Bailey Aff.") at ¶ 9.[3] Briefly, Endorsement 2 states in relevant part that "if any Loss covered by this policy *is also covered by the Underlying [D&O] Policy*," then the R&W Policy applies in excess of the amount of any payment under the D&O Policy. Facts[4] ¶ 32 (emphasis added). In accordance with this plain language, the only plausible construction of the Endorsement is that the R&W Policy serves as excess coverage in the limited circumstance where a Loss arising out of a Wrongful Act by D'Amelio is covered independently under *both* the R&W Policy and the D&O Policy. Bailey Aff. ¶ 9.

Instead, D'Amelio argues that the D&O Policy must always provide coverage when a Claim is made under the R&W Policy, otherwise "there would never be occasion for the two policies to cover the same thing, and, thus, act as primary and excess." D'Amelio then relies on this unsupportable conclusion to argue that unless the D&O Policy always applies, the "primary-excess relationship" of the policies is therefore "illusory." Pl. Memo at 11.

D'Amelio's argument fails to comport with the language of the policies or Massachusetts case law. First, even though the D&O Policy is not automatically triggered whenever there is a Claim under the R&W Policy, both policies would provide coverage for the same Loss whenever a claim was asserted against D'Amelio in his capacity as President *and* "in connection with the Representations and Warranties." *See*, R&W Policy at 8. To take one example among several,

[3] The Affidavit of Dan Bailey is attached to the defendants' Joint Appendix of Documents Cited in their Local Rule 56.1 Statement of Undisputed Facts at Tab 23.

[4] References to "Facts" throughout this opposition are to Defendants Federal Insurance Company's and Chubb Insurance Company's Joint Statement of Undisputed Material Facts submitted with their affirmative motion for partial summary judgment in accordance with L.R. 56.1.

Massachusetts Mutual Life Insurance Company– a former shareholder in TACC and one of the defendants-in-counterclaim in the underlying ITW litigation – could have brought a cross-claim against D'Amelio, alleging that D'Amelio jeopardized MassMutual's contingent interest in the $4 million escrow as a result of D'Amelio's misrepresentations as the President of TACC. Pursuant to Endorsement 2 of the R&W Policy, the D&O Policy would respond to that Loss as primary insurance and the R&W Policy would respond as excess.

Second, D'Amelio's proposed construction of the Policies renders the phrase "is also covered" in Endorsement 2 meaningless. Endorsement 2 states that "*if* any Loss covered by this policy *is also covered by* the Underlying [D&O] Policy," (emphasis added) then the R&W Policy shall apply in excess of the amount of any payment under the D&O Policy. The highlighted language clearly contemplates that both policies would cover the same Loss only in certain instances, not in all circumstances. If the D&O Policy covered every claim that the R&W Policy covered, the language "is also covered" would be superfluous. Under established principles of Massachusetts contract law, the Court must reject such a construction. *See Baybank Middlesex* v. *1200 Beacon Properties, Inc.*, 760 F. Supp. 957, 963 (D. Mass. 1991), citing *Shea* v. *Bay State Gas Co.*, 383 Mass. 218, 225 (1981) (holding that court must not construe a contract so as to render a contract term meaningless).

Third, even if it is assumed *arguendo* that the plain language of Endorsement 2 is subject to more than one reasonable interpretation – which it is not – the language of the Endorsement nevertheless must be construed against D'Amelio. Under Massachusetts law, contract language must be construed against the party who drafted it. *See LeBlanc* v. *Friedman*, 438 Mass. 592, 602 n.1 (2003). It is undisputed that D'Amelio's former counsel, Joseph Blute, drafted Endorsement 2. Facts ¶ 21. It also is undisputed that in a memorandum preceding the

incorporation of that Endorsement in the D&O Policy, Mr. Blute explained to his partner at Mintz Levin that "[t]he ideal situation would be overlapping policy periods in which, *in the event of a claim covered by both policies*, the D&O Policy would act as the primary policy." Facts ¶ 20. Mr. Blute further noted that the proposed representations and warranties policy form prevented this in practice and suggested that D'Amelio seek an endorsement to the proposed Federal representations and warranties policy to accomplish this goal. *Id.* The endorsement language accomplishing this purpose ultimately was incorporated in the R&W Policy as Endorsement 2. Facts ¶¶ 20, 21, 32.

D'Amelio further tortures the policy language by first asserting that the language of the D&O Policy is inconsistent with Endorsement 2 to the R&W Policy, and then arguing that the "manifest intent of the parties" must override the capacity limitation in the form of the D&O Policy. Pl. Memo at 13-14. This contention is groundless. The requirement that any Loss under the D&O Policy must arise from claims asserted against D'Amelio in his Insured Capacity as an officer or director of TACC is wholly consistent with Endorsement 2 to the R&W Policy. Again, Endorsement 2 provides "*if* any Loss covered by this policy *is also covered by the underlying [D&O] Policy*" (emphasis added) then the R&W Policy shall apply excess to the D&O Policy. If a Claim against D'Amelio is covered under the R&W Policy and also is asserted against him in his capacity as President of TACC, it will trigger coverage under the D&O Policy. However, if a claim is asserted against D'Amelio in his capacity as a shareholder of TACC, thereby triggering coverage under the R&W Policy, but is not asserted against him as TACC's President, coverage is not triggered under the D&O Policy because the claim was not asserted against him in his

Insured Capacity under the D&O Policy.[5] Because the language of the two policies is not in any way contradictory, the deductible and primary-excess provisions in the R&W Policy need not, as D'Amelio claims, "prevail" over the "generalized" Insured Capacity language set forth in the D&O Policy. Pl. Memo at 13.

B. ITW's Claims Were Not Asserted Against D'Amelio in his Insured Capacity as an Officer or Director.

1. ITW's claims were asserted solely against TACC's stockholders.

As explained above and in Federal's and Chubb Custom's memorandum in support of their motion for partial summary judgment, ITW's claims and counterclaims against D'Amelio were asserted against D'Amelio as a shareholder of TACC, not against him as TACC's President.

While D'Amelio avers that ITW's claims were asserted against him in his capacity as President of TACC, Pl. Memo at 15-17, he completely ignores ITW's initial statement of its claims in which ITW makes clear that it is pursuing the stockholders – not the officers or directors. In its letter dated September 17, 1999 – nine months before ITW asserted claims against D'Amelio – ITW put the escrow agent and the TACC "Stockholders" on notice of a claim against the escrow. Facts ¶ 35. ITW alleged various violations of the representations and

[5] Even if the Court were to find that certain of ITW's claims triggered coverage under the D&O Policy, there would still have to be an allocation of that Loss between the D&O Policy and the R&W Policy. Of course, that allocation would be subject to the deductibles and any applicable exclusions of each of the policies. For example, if 10% of a hypothetical $4 million Loss by D'Amelio was attributable to representation and warranty claims asserted against him for wrongdoing as TACC's President (and thereby covered under both the D&O Policy and the R&W Policy), then the D&O Policy would pay D'Amelio $350,000 ($400,000 Loss - $50,000 deductible). The remaining $3.6 million of the Loss would then be covered under the R&W Policy. Pursuant to Endorsement 2, the $2.4 million deductible of the R&W Policy would be reduced by the $350,000 paid by Federal under the D&O Policy and the $50,000 deductible paid by D'Amelio to $2 million. As a result, Chubb Custom would pay D'Amelio $1.6 million ($3.6 million Loss - $2 million deductible) under the R&W Policy.

warranties in the Stock Purchase Agreement by the "Sellers," whom it defined as "the persons whose names appear on the signature page of the Escrow Agreement, *being the holders of all of the issued and outstanding stock of the Company* [TACC]." Facts ¶ 37 (emphasis added). Nowhere did ITW assert claims against D'Amelio by name or as a director or officer of TACC, or against any of the other stockholders in any capacity other than in their capacity as "stockholder" or "sellers." Facts ¶¶ 35, 38. The September 17, 1999 demand letter is consistent with ITW's subsequent counterclaims against D'Amelio and the other shareholders of TACC. Each of the six counts in ITW's original and amended counterclaims names the "Stockholders" as the sole wrongdoers. None of the counts alleges any wrongdoing by D'Amelio individually or by D'Amelio in his capacity as an officer or director of TACC. Facts ¶ 71.

The absence of any claim against D'Amelio in his capacity as President is to be expected. The basis for the counterclaims was a series of alleged misrepresentations in the Stock Purchase Agreement. Both TACC and the former TACC stockholders made representations and warranties in the Stock Purchase Agreement; but D'Amelio, in his capacity as TACC's President, did not; nor did any of the other officers or directors.[6] *See* Stock Purchase Agreement, § 6.02. Further, under Section 6.02 of the Agreement *only the former stockholders* indemnified ITW for any breach or failure to perform any of the representations and warranties.[7] As a result, under the

[6] The fact that a TACC representative had to sign the Stock Purchase Agreement on behalf of TACC does not mean that D'Amelio, the individual who signed for TACC, made representations and warranties in his capacity as an officer or director simply by virtue of his signature as TACC's representative. Similarly, the fact that D'Amelio signed on TACC's behalf and happened to be an officer at the time does not create any cause of action against him in his capacity as an officer.

[7] Section 6.02 of the Stock Purchase Agreement also provided that ITW's remedy for any breach of the Agreement was limited to its rights against the stockholders under that Section, including a $20 million "Liability Cap," except "in the case of fraud." While ITW later amended its counterclaims to include a count for fraud and a count for violation of G.L. c. 93A, it never asserted those counts against anyone other than the stockholders.

Stock Purchase Agreement, ITW only had claims against the stockholders and accordingly its counterclaims were asserted solely against the stockholders.

D'Amelio nonetheless asserts that ITW's counterclaims were asserted against him at least in part in his capacity as an officer or director. Unable to identify a single ITW counterclaim that specifically names him in his capacity as President of TACC, D'Amelio relies on ITW's generalized background facts supporting its counterclaims that the "management team" of TACC made certain misrepresentations in connection with the Stock Purchase Agreement. Pl. Memo at 15-17. Contrary to D'Amelio's assertion, these background facts are insufficient to trigger coverage under the D&O Policy. What D'Amelio fails to recognize is that the trigger for coverage under the D&O Policy is not whether misdeeds may have been committed by the Insured in his capacity as a director or officer, but rather, whether the *Claims* giving rise to the Loss were asserted against him in that Insured Capacity. Facts ¶ 26; Bailey Aff. ¶ 7. As noted above, the actual *Claims* asserted – the six counterclaims – were brought against D'Amelio and others as the selling "Stockholders" in TACC, even though some of them also were officers of TACC. General statements of wrongdoing by TACC management (and the fact that D'Amelio by definition was part of that management team) are insufficient to trigger coverage under the D&O Policy, unless ITW made a substantive claim against D'Amelio in his capacity as an officer or director, which it did not.

D'Amelio tries to deny the significance of ITW's identification of the wrongdoers in its counterclaims as the "Stockholders" of TACC, contending that the repeated use of the term "Stockholders" was simply a short-form. Pl. Memo at 17. However, numerous facts establish that ITW's use of the term "Stockholders" was not merely a convenient short-form, but rather a deliberate specification of the capacity of the entities and persons against whom ITW intended to

assert its claims and from whom it sought recovery. For example, ITW's counterclaims explicitly defined "The Stockholders" as "the stockholders of TACC." Facts ¶¶ 57, 70. Further, ITW could have made claims against D'Amelio and the other officers of TACC specifically in their capacities as officers. It did not do so. Similarly, ITW could have sued TACC if it intended to seek recovery from entities or individuals other than the TACC stockholders. Again, ITW did not do so. There is nothing in ITW's claims to the escrow agent or in its counterclaims to the stockholders' complaint, including those few general assertions of misconduct by TACC's "management team," that remotely establishes that ITW was asserting its claims against D'Amelio in his capacity as the President or a director of TACC.

2. The capacity in which D'Amelio signed the Stock Purchase Agreement is irrelevant.

D'Amelio also seeks refuge in the fact that he signed the Stock Purchase Agreement on behalf of TACC. He argues repeatedly that any claim that D&O coverage was not triggered must rest on the assumption that he did not sign the agreement in his capacity as an officer or director. Pl. Memo at 10, 13. Chubb Custom and Federal agree that D'Amelio signed the Stock Purchase Agreement in his capacity as President of TACC, as well as in his capacities as owner of Jezebel Management and a stockholder in TACC. However, the fact that he signed the agreement in part as President of TACC, without more, is irrelevant to the determination whether D&O coverage was triggered.

Pursuant to the plain language of the Insuring Clause and the definitions of Loss and Wrongful Act in the D&O Policy, coverage is triggered where a Claim is asserted against D'Amelio for misrepresentations or other misconduct in his Insured Capacity as an officer or director. Facts ¶¶ 26, 34. That D'Amelio signed the Stock Purchase Agreement on TACC's

behalf does not speak to, much less demonstrate, that ITW asserted its claims against D'Amelio as President of TACC. Not surprisingly, D'Amelio has not cited a single authority for the proposition that the capacities in which he signed the Stock Purchase Agreement are relevant to whether ITW's claims were asserted against him in his Insured Capacity under the D&O Policy.

3. The cases on which D'Amelio relies are inapposite.

D'Amelio relies primarily on *Raychem Corp.* v. *Federal Ins. Co.*, 853 F. Supp. 1170, 1184 (N.D. Cal. 1994), to support his contention that ITW's claims were asserted against him in his Insured Capacity as an officer or director. Pl. Memo at 15. In *Raychem*, the court addressed whether D&O coverage was triggered where the underlying complaint specifically alleged that the defendant officers and directors had taken actions in their capacities as directors and officers in order to inflate a company's stock price in anticipation of a stock conversion from which they stood to benefit. *Id.* at 1184. The court held that there was a material issue of fact as to whether the underlying claims against the defendants were asserted against them in their capacity as officers and directors within the meaning of the D&O Policy. *Id. Raychem* is distinguishable on several grounds.

First, the *Raychem* court relied on the fact that the underlying claims were asserted against the directors and officers for misconduct committed squarely in their capacities as directors. The underlying complaint, brought by shareholders, alleged that the named defendants, all of whom were directors or officers of a publicly traded company, took actions to maximize the company's reported income. *Id.* at 1174. Here, by contrast, ITW's claims were brought solely against the stockholders of TACC, a closely-held corporation, for alleged misconduct squarely within their capacity as shareholders, namely, misrepresentations in connection with the sale of their stock to ITW. Indeed, ITW did not even name TACC as a

defendant, reflecting that ITW sought recovery from D'Amelio and TACC's other shareholders as owners of the business, not from the company or any officers acting on its behalf.

Second, the *Raychem* court relied on the fact that the underlying complaint "specifically alleges that [the plaintiffs] were acting as officers and directors in publishing the statements." *Id.* That is not the case here. As discussed above, the six underlying ITW counterclaims repeatedly assert that D'Amelio and the other TACC shareholders made certain misrepresentations as "stockholders" in connection with the Stock Purchase Agreement. ITW made no claim against D'Amelio in his capacity as an officer or director, as required under the D&O Policy.

Finally, the *Raychem* court relied on the fact that the underlying complaint "named officers who did not own or sell stock as defendants." *Id.* at 1184-85. Here, by contrast, all of the individuals and entities sued by ITW were stockholders in TACC, and were identified by ITW as such in each of the counterclaims. Further, many of those stockholders, such as Jezebel Management, Massachusetts Capital Resource Company, Massachusetts Mutual Life Insurance Company, and Massachusetts Corporate Value Partners Limited, were not directors or officers of TACC.[8]

D'Amelio has failed to cite a single case standing for the novel proposition he espouses, namely, that coverage under the D&O Policy was triggered simply by the fact that D'Amelio happened to be an officer of TACC when he and the other shareholders made the

[8] The other case on which D'Amelio relies, *MacMillan* v. *Federal Ins. Co.*, 764 F. Supp. 38 (S.D.N.Y. 1991), also is inapposite. That case addressed whether certain acts were undertaken by corporate officers in their insured capacity for the purposes of assessing whether the insurer was entitled to subrogation against the insured. *Id.* at 41-42. The court was not asked to resolve the issue here, namely, whether claims asserted against shareholders were asserted within their Insured Capacity as officers and directors for the purposes of the Insuring Clause of a D&O Policy. Further, the *MacMillan* court noted in dictum that the misconduct at issue was *not* covered by the D&O Policy at issue. The court merely determined that, for the purposes of subrogation analysis, the acts at issue were undertaken by the officers in their official capacity. *Id.* at 42.

misrepresentations in the Stock Purchase Agreement. D'Amelio also has failed to address the long line of cases in which courts have granted summary judgment to defendant insurers where, as here, the claims for which coverage is sought under a D&O policy were (1) brought against an individual who happened to serve as an officer or director of the insured company, but (2) the claims in the underlying pleadings plainly were not asserted against that individual in his Insured Capacity as an officer or director. *See* Def. Memo at 8-9 and n.9 (collecting and discussing cases). In the absence of any authority supporting D'Amelio's contention, the Court should deny his motion for partial summary judgment.

II. D'AMELIO IS NOT ENTITLED TO REIMBURSEMENT OF A SHARE OF THE ESCROW FUND

D'Amelio contends that a portion of the $4 million escrow fund released to ITW as part of the settlement of the ITW litigation is recoverable as a Loss under the D&O Policy and R&W Policy. Pl. Memo. at 18-20. The facts show, however, that D'Amelio was never entitled to any portion of the $4 million escrow, and therefore the distribution of those funds to ITW does not constitute a Loss under the policies.

The Stock Purchase Agreement and Escrow Agreement created a $4 million escrow fund to secure the representations and warranties in the Stock Purchase Agreement made by the former TACC stockholders. The Escrow Agreement provided that all or a portion of the $4 million would be distributed not to the stockholders, *but to ITW*, unless TACC met certain earnings targets (e.g. $14.6 million in earnings before interest, taxes, and amortization, or "EBITA") within the first fiscal year after the acquisition. Only if the earnings targets were met would the stockholders be entitled to the escrow amount, and then only if there were any funds remaining after the escrowed funds had satisfied any damages sustained by ITW as a result of any breach by the stockholders of the representations and warranties.

There is no dispute that as part of the October 31, 2002 settlement agreement between ITW and the former TACC stockholders, ITW received the entire escrow, including interest. Facts ¶ 77; Plaintiff's Statement of Material Facts, ¶ 71. In an attempt to characterize the escrow funds distributed to ITW as a Loss covered under the policies, however, D'Amelio tries to blur the distinction between the cash D'Amelio actually paid ITW as part of the settlement and the portion of the escrow funds released to ITW. For purposes of this motion, Federal and Chubb Custom do not dispute that ITW was paid $5,707,443 in cash in settlement of its claims against the shareholders. Pl. Memo at 18.[9] However, contrary to D'Amelio's contention, the facts show that D'Amelio never "***paid*** 65.21% of the $4,733,443 escrow fund released to ITW." Pl. Memo at 18 (emphasis added). Under the terms of the Escrow Agreement, the former TACC stockholders, including D'Amelio, never had any right to the escrow funds. As a result, D'Amelio never had a percentage of those funds to *pay* to ITW.

In its initial demand to the Escrow Agent on September 17, 1999, ITW made two claims to the escrow: ITW alleged various breaches of the representations and warranties of the Stock Purchase Agreement *and* alleged TACC's failure to achieve the financial targets established in the Stock Purchase Agreement and the Escrow Agreement. Not only did ITW allege that TACC had failed to reach the financial targets, but it alleged that TACC had, in fact, fallen so far short of those targets that ITW was entitled to *all* of the escrow funds. Facts ¶ 35. Litigation ensued in which the former TACC stockholders did not dispute that TACC had failed to meet the earnings targets set forth in the Stock Purchase and Escrow Agreements, but claimed that ITW should

[9] It should be noted, however, that the facts cited by D'Amelio in support of this proposition do not directly address whether D'Amelio (or another entity controlled by D'Amelio) actually paid funds to ITW. For purposes of this motion, however, Federal and Chubb Custom do not dispute that such a payment was made, by someone, to ITW.

have taken into account payments under a business interruption insurance policy in calculating whether TACC had reached its financial targets. *See* Complaint and Demand for Jury Trial, ¶76 (attached at Tab B to D'Amelio's Exhibits to Concise Statement of Material Facts in Support of D'Amelio's Motion for Partial Summary Judgment). Both sides hired experts with conflicting views on these issues. In October 2002, the litigation was settled *without an adjudication of these issues or any admission of liability by either side.* Given the disagreement over whether TACC reached its financial targets, there remains a significant issue of disputed fact as to whether D'Amelio ever was entitled to any of the escrow funds and, consequently, whether he could ever have been "legally obligated to pay" them to ITW as a result of misrepresentations in the Stock Purchase Agreement.

In short, D'Amelio's claim is premised (1) on his alleged right to a percentage share of the escrow and (2) the requirement in the settlement agreement that the escrow be distributed to ITW. However, because it is undisputed that D'Amelio never had more than a contingent interest in some portion of the escrow funds, he cannot claim the release of those funds to ITW as a Loss covered by either policy. Accordingly, he cannot be "legally obligated to pay" them as a result of a Claim covered by the policies. D'Amelio's request for summary judgment on this issue must be denied.

Conclusion

WHEREFORE, for the reasons stated above and in the defendants' memorandum in support of their Motion for Partial Summary Judgment, the defendants respectfully request that

the Court deny D'Amelio's Motion for Partial Summary Judgment and enter partial summary judgment for Federal and Chubb Custom.

Respectfully submitted,

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December 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2003, a copy of the foregoing Federal Insurance Company's and Chubb Custom Insurance Company's Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment was served by hand on:

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