No. 07-2305

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ASTENJOHNSON, INC.,

Appellant,

v.

COLUMBIA CASUALTY CO. AND FIREMAN'S FUND INSURANCE COMPANIES,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS, IN SUPPORT OF APPELLANT FOR REVERSAL OF DISTRICT COURT

Andrew M. Roman
Richard A. Ejzak
COHEN & GRIGSBY, P.C.
11 Stanwix Street
15th Floor
Pittsburgh, PA 15222
Phone: 412-297-4900

Amy Bach
United Policyholders
11 Pacific Avenue
No. 262
San Francisco, CA 94111
(415) 343-9990

Attorneys for *Amicus Curiae*, United Policyholders

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 07-2305

AstenJohnson Inc.

v.

Columbia Cslty Co., et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, United Policyholders
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

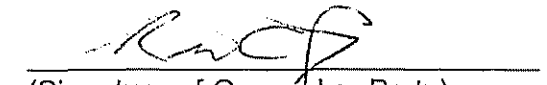
None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A



(Signature of Counsel or Party)

Dated: 1-4-08

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders was founded in 1991 and is a single-issue, non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is a recognized charity with tax exempt status under Internal Revenue Code § 501(c) (3), funded by donations and grants from individuals, businesses and foundations.

United Policyholders is an information resource on sales, coverage, claims and litigation related issues pertaining to personal and commercial lines insurance products. The organization sponsors public forums in communities hit by natural disasters, and an average of 20,000 monthly visitors read articles and tips at www.unitedpolicyholders.org. United Policyholders participates in proceedings of the National Association of Insurance Commissioners and receives frequent invitations to speak to trade and civic associations and to testify at public hearings on insurance rate and policy issues. It also protects the interests and presents the positions of policyholders through participation as *amicus curiae* in insurance coverage cases throughout the country.

Commercial and individual policyholders communicate on a regular basis with United Policyholders, and leading policyholder advocates across the United States are volunteers with and advisors to the organization. By monitoring the insurance and claims landscape, United Policyholders is able to submit pertinent

and accurate information to courts throughout the country via *amicus* briefs. United Policyholders has participated as *amicus curiae* in more than 240 cases across the country involving significant insurance issues. The organization's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in the United States Supreme Court's opinion in Humana Inc. v. Forsyth, 525 U.S. 299 (1999), and its arguments were adopted by the California Supreme Court in Vandenberg v. Superior Court, 88 Cal. Rptr. 2d 366 (Cal. 1999) and in TRB Investments, Inc. v. Fireman's Fund Insurance Co., 50 Cal. Rptr. 3d 597, 145 P.3d 472 (2006). Points raised in United Policyholders amicus briefs have made their way into many published opinions, including, most recently, Travelers Casualty and Surety Co., et. al. v. United States Filter Corp., 870 N.E.2d 529 (Ind. Ct. App. 2007), transfer granted and vacated by No. 49S02-0712-cv-596, 2007 Ind. LEXIS 1121 (Ind. Dec. 20, 2007), and in Landry v. Louisiana Citizens Property Insurance Co., 964 So.2d 463 (La. Ct. App. 2007).

United Policyholders has participated as *amicus curiae* in prior proceedings in this jurisdiction. See General Refractories Co. v. First State Insurance Co., 500 F.3d 306 (3d Cir. 2007); Barber v. Unum Life Insurance Co. of America, 383 F.3d 134 (3d Cir. 2004); Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3d Cir. 2005).

ARGUMENT

I. Policyholders Have the Right to Select the Policies Under Which They Seek Coverage, Without Fear of Prejudice to Any Laches or Course of Performance Argument.

The district court decision on appeal violates a fundamental right of policyholders – the right to select the policies under which they seek coverage. The Pennsylvania Supreme Court explicitly recognized that right in the landmark case of J. H. France Refractories Co. v. Allstate Insurance Co., 534 Pa. 29, 626 A.2d 502 (1993). In J. H. France, the supreme court declared that the policyholder "should be free to select the policy or policies under which it is to be indemnified." 534 Pa. at 41, 626 A.2d at 508. As a practical matter, the supreme court recognized that the insured is not limited to making this selection at a single moment in time. Rather, the selection process can occur over time:

> When the policy limits of a given insurer are exhausted, J. H. France is entitled to seek indemnification from any of the remaining insurers which was on the risk during the development of the disease.

534 Pa. at 42, 626 A.2d at 509.

As AstenJohnson points out, the decision in J. H. France "would be undermined if an insured, after exhausting one policy, sought indemnification under another and found itself barred by laches." (Appellant's Br. 44.) The court reached the same conclusion when confronted with a similar time-bar argument in

Koppers Company, Inc. v. Certain Underwriters at Lloyd's, et al., 146 P.L.J. 159 (Alleg. Cty. 1998) (Wettick, J.). A copy of this opinion is attached as Appendix, Tab A for the Court's convenience. The insurer in Koppers argued that the policyholder's claims were barred by the statute of limitations. Id. at 165-66. The court rejected that argument, based on the ruling in J. H. France that protects an insured's right to decide what policies to pursue. Id. As the court in Koppers explained:

> If I were to adopt the position of [the insurance companies], the insured would not have options. It would be required within four years of an expenditure to proceed against every insurance company that may be obligated to provide coverage under J. H. France Refractories Co.
>
> * * *
>
> The purpose of the Supreme Court's ruling in J. H. France Refractories was to permit Koppers to decide how it could maximize coverage. Under J. H. France Refractories, it is Koppers, rather than INA, that may decide the order in which the various policies will pay Kopper's claims. A ruling that imposes upon Koppers the duty to sue any insurance company that might have any legal obligation to provide coverage within four years of any expenditure that may trigger coverage would undermine the J. H. France Refractories ruling by taking away Koppers' ability to decide which policies will pay Koppers' claims.

Id. at 166. The court further emphasized that, under the insurance companies' position, "as a practical matter, Koppers cannot make decisions as to how it would like to allocate its insurance claims among the various carriers. If claims are not fully resolved within four years of an expenditure, Koppers must sue on every

policy." Id. The court rejected that approach as being in conflict with J. H. France.

The district court's decision in the present case conflicts with J. H. France for the same reasons. The district court found that AstenJohnson's suit against Columbia was barred by laches based on the mistaken belief that AstenJohnson should have tendered and sued for coverage of other claims (not at issue here) years earlier, at the time it sued other carriers.[1] It was not for the district court to second-guess the order in which AstenJohnson selected certain policies for coverage. Under J. H. France, that decision must be left to the policyholder.

The district court also improperly cited the timing of AstenJohnson's decision to pursue coverage under the Columbia and American policies as "the most compelling evidence" that AstenJohnson did not believe there was coverage for any asbestos-related claims under those policies. JA I 130. In addition to all of the reasons AstenJohnson presents to show why that inference is incorrect (see

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[1] The district court mistakenly believed that AstenJohnson's decision not to select Columbia's policy until later in the claims cycle prejudiced Columbia. The grounds on which the district court found prejudice are incompatible with the ruling in J. H. France. (see Appellant's Br. 45-47.) In addition, those grounds are incompatible with the very nature of the policies that are at issue here. The policies in this case are occurrence-based. Unlike claims-made policies, occurrence-based policies are designed to provide coverage for claims that might not arise until years after the policy expires. Thus, an insurer who issues an occurrence-based policy necessarily faces uncertainty in setting reserves and addressing pricing issues for subsequent policies.

Appellant's Br. 36-39), the inference also is improper because it conflicts with the right to pick and choose recognized in J. H. France. If a court were permitted to make such an inference, a policyholder would not be free to decide when to select certain policies for coverage. Instead, the policyholder would need to consider whether the policies must be selected in a certain order to avoid creating a "course of conduct" that could prejudice the ability to obtain coverage. That concern should not be part of the policyholder's analysis under J. H. France. Thus, it was improper for the district court to infer anything negative about AstenJohnson's intent based on the order in which AstenJohnson selected policies for coverage.

In short, the district court's decision penalizes the policyholder in two ways for exercising the right to select the policies for coverage – in applying the doctrine of laches and in applying the course of performance canon of interpretation. The right of a policyholder to pick and choose among its policies is well-established in Pennsylvania. Accordingly, the district court's decision should be reversed.

II. Policyholders Should Be Permitted to Take Broad Discovery on Custom and Usage in the Insurance Industry.

Insurance companies have an enormous advantage over policyholders in establishing custom and usage in the insurance industry. The insurance industry obviously is the arena in which insurance companies operate. As a consequence, information about that industry is readily available to insurers. Policyholders, by

contrast, only have contact with the world of insurance episodically. They do not have access to the same wealth of information that the insurers have.

Because of this disparity, it is essential that policyholders have the opportunity to take broad discovery on matters relating to custom and usage in the insurance industry. Discovery is the policyholder's vehicle to access at least some of the information that insurers have at their disposal. The need for discovery on trade custom and usage takes on heightened significance where the court relies on that type of evidence to interpret the language in a policy.

Courts have recognized the importance of permitting policyholders to take discovery on facts related to custom and usage in the insurance industry. Numerous decisions have ordered insurers to produce information regarding (a) the drafting history of policy provisions;[2] (b) handling of similar claims by other

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[2] See Indiana Gas Co., Inc. v. Aetna Cas. & Sur. Co., No. 1:95CV0101 (N. D. Ind., Dec. 15, 1995), reported in Mealey's Litigation Reports: Insurance, Vol. 10, No. 12, slip op. at 4 (N.D. Ind. Jan. 30, 1996) (attached as Appendix, Tab B) (court compelled the production of drafting history documents and other interpretative documents, reasoning that production of drafting history documents was appropriate given the overwhelming federal and state court authority that has supported such production in resolving similar insurance coverage disputes); Wisconsin Gas Co. v. Aetna Casualty & Surety Company, et al., No. 94-C-87-S (W.D. Wis. Sept. 2, 1994) (attached as Appendix, Tab C) (district court ordered the insurers to produce drafting history and other interpretive documents); Pfizer, Inc. v. Employers Ins. Co. of Wausau, No. C-108-92 (N.J. Super. Ct. Ch. Civ. Mar. 31, 1995), reported in Mealey's Litigation Reports: Insurance, Vol. 9, No. 28, slip op. (May 23, 1995) (attached as Appendix, Tab D) (discovery master issued a

insureds;[3] promotional and training materials, including manuals and guidelines for underwriting and claims handling;[4] and standard practices and procedures in claims handling and underwriting.[5]

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recommendation that the insurers produce all drafting history documents relating to the standard form policy provisions relied upon by insurers to deny coverage); Leksi, Inc. v. Federal Ins. Co., 129 F.R.D. 99, 104 (D.N.J. 1989) ("[t]he drafting history of the policies, the insurer's participation in organizations involved in their drafting and their adoption of standard form language promulgated by these organizations is relevant to the insurers' intent concerning the policies in question."). See also Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 103-06, 104 n.4 (D.N.J. 1990); Champion Int'l Corp. v. Liberty Mut. Ins. Co., 129 F.R.D. 63, 66-67 (S.D.N.Y. 1989) (holding that drafting history of policy provisions in question are "clearly germane to the interpretation of such policies").

3 See Nestle Foods Corp., 135 F.R.D. at 106-107 (information about handling of claims by other insureds "is relevant for purposes of discovery since it may show that identical language has been afforded various interpretations by the insurers"); Wisconsin Gas Co., No. 94-C-87-S (W.D. Wis., September 2, 1994) (court ordered the insurers to produce documents relating to the handling of other similar environmental claims filed with defendants) (Appendix, Tab C); Timrod Rentex Corp. v. Guarantee Ins. Co., No. 524615 (Cal. Super. Ct. Nov. 5, 1992), reported in Mealey's Litigation Reports: Insurance, Vol. 7, No. 3, slip op. at 12-13 (Nov. 17, 1992) (attached as Appendix, Tab E) (court ordered production of documents related to the insurer's providing a defense, paying any claims or settling any claims with any other policyholder that filed a claim with that insurer for damage from similar contamination); National Union Fire Ins. Co. of Pittsburgh v. Stauffer Chem. Co., 558 A.2d 1091, 1095 (Del. Super. Ct. 1989).

4 See Pfizer Inc., No. C-108-92, slip op. at 6 (discovery master ordered the production of all promotional, marketing and advertising materials, distributed to the plaintiff or its brokers, together with manuals and published internal operating procedures; noting that there is "ample" federal and state court support for ordering the production of such materials as an aid in interpreting policy language and for ascertaining the intent of the insurers); Nestle Foods Corp., 135 F.R.D. at 104 n.4, 106 (ordering

The district court in the present case denied the policyholder's attempts to take discovery in all of those areas. JA II 1-2, 4. That was error. The district court then compounded that error by relying on the insurer's evidence of trade usage to determine the meaning of the policy at issue. Full discovery on custom and usage is especially warranted when the dispute involves language used in a form exclusion that the district court found had a "dual meaning . . . in the insurance industry." JAI 138. Insurers having ready access to the evidence of both usages are free, absent the rigors of full discovery, to present a selective, one-sided view of that evidence to the fact finder.

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defendant insurance companies to produce underwriting and instructional materials or manuals, as well as "how-to-sell" and promotional materials relating to the policies); Champion Int'l Corp., 129 F.R.D. at 67-68 (affirming magistrate's order compelling production of how-to-sell instructions and claims manuals); Lincoln Properties Ltd. V. CIGNA Ins. Co., No. 238274 (Cal. Super. Ct. Dec. 3, 1992) reported in Mealey's Litigation Reports: Insurance, Vol. 7, No. 8, slip op. at 2-3 (Dec. 22, 1992) (attached as Appendix, Tab F) (ordering production of, inter alia, claims handling documents and advertising and promotional materials); Missouri Pac. R.R. Co. v. Certain Underwriters at Lloyd's, London, No. 93 L 712 (Ill. Cir. Ct., Feb. 23, 1995), reported in Mealey's Litigation Reports: Insurance, Vol. 9, No. 20, slip op. at 8 (Mar. 28, 1995) (attached as Appendix, Tab G) (requiring production of all marketing, promotional or advertising materials relating to the types of policies issued to plaintiff which discuss question of coverage for liability relating to pollution or environmental damage).

5 See Pfizer Inc., No. C-108-92, slip op. at 7 (discovery master recommended production of "those manuals and internal operating procedures issued from the date of the plaintiffs' first policy to the present on the subjects of 'underwriting,' 'coverage procedure,' 'existing claims procedures,' to the extent these are available."); Champion Int'l Corp., 129 F.R.D. at 67-68 (and cases cited therein); Missouri Pac. R.R. Co., No. 93 L 712, slip op. at 6.

Courts should not hamstring a policyholder's efforts to obtain evidence of custom and usage in the insurance industry, particularly where evidence regarding trade usage provides the basis for interpreting the language in the policy.

III. The Borel Decision Is Literally the Textbook Case That Used the Very Phrase the District Court Found to be Nonsensical.

The district court apparently believed that the phrase "exposure . . . to asbestosis" should be read to mean "exposure . . . to asbestos" based on the narrow thinking that otherwise this phrase did not make sense, since asbestosis was not a contagious disease. But as pointed out in appellant's brief, this very phrase – "exposure to asbestosis" – was used by the United States Court of Appeals for the Fifth Circuit to describe claims alleging a failure to warn of the risks of contracting asbestosis in the seminal case of Borel v. Fiberboard Paper Products Corporation, 493 F.2d 1076, 1105 (5th Cir. 1973). To this day, the Borel case is used to teach this principle of tort law:

> Borel is a leading decision on articulating the basis of liability for asbestos producers on a failure to warn theory. The informational defects in this case relate largely to informed choice, and only secondarily to risk reduction. As the court states elsewhere in its opinion, "The rationale for this rule [requiring disclosure of the risks] is that the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing him to the risk of harm."

M. Stuart Madden and Gerald W. Boston, *Law of Environmental and Toxic Torts Cases Materials and Problems* (3d Ed. 2005 Thomson West) at 409. The "risk of harm" referred to is the risk of contracting asbestosis, mesothelioma, or other asbestos-related cancers. 493 F.2d at 1105. Here, the insurer sought only to exclude coverage for claims based on exposure to the risk of contracting asbestosis, and not the other well known asbestos-related diseases, but the district court expanded the scope of the exclusion after the fact.

IV. Policyholders Are Entitled to a Jury Trial Where Their Claims Seek Relief in Law as well as Equity.

In ruling that AstenJohnson was not entitled to a jury trial, the district court not only deprived AstenJohnson of a fundamental constitutional right; it also employed the wrong approach to determining whether AstenJohnson's claims were equitable or legal. The law favors claims in law over those in equity. Only where there is no adequate remedy at law will a court permit a case to proceed in equity. Pennsylvania State Chamber of Commerce v. Torquato, 386 Pa. 306, 327-30, 125 A.2d 755, 765-67 (1956).

The lengths to which courts have gone to avoid finding that claims are equitable in nature is demonstrated in Sunbeam Corp. v. Liberty Mut. Ins. Co., 144 P.L.J. 491 (Alleg. Cty., July 17, 1996) (Wettick, J.). A copy of this opinion is

attached as Appendix, Tab H for the Court's convenience. All of the claims before the court in Sunbeam (including claims for estoppel and fraudulent claims handling) were equitable on their face. There were no claims for breach of contract, nor were there any other typically legal causes of action. Moreover, the relief requested in each of the claims was purely equitable. None of the claims sought money damages. The court nonetheless found that the action was legal rather than equitable because the policyholder's claims could be asserted in a breach of contract count. For that reason, the court found that the policyholder had an adequate remedy at law and refused to permit the case to proceed in equity. Thus, even where the policyholder's complaint did not seek damages and instead requested only equitable relief, the court investigated further to see if the action should proceed at law rather than in equity.

The district court in the present case took the opposite approach. Confronted with a straightforward breach of contract claim which sought monetary damages, the district court devoted its efforts to predicting whether there would be adequate evidence to prove those damages at trial. That effort was misdirected.

The denial of the policyholder's right to a jury trial in the present case is undeniably significant because of disputed issues of fact surrounding the interpretation of the policy. For example, the parties presented conflicting evidence regarding custom or usage of the relevant language in the insurance

industry. That evidence created a factual dispute that should have been resolved by a jury, not the judge. See, e.g., Electric Reduction Co. v. Colonial Steel Co., 276 Pa. 181, 191, 120 A. 116, 120 (1923) ("The existence of a usage or custom is generally regarded as a question of fact for the determination of the jury when the evidence is conflicting."); Mid-State Sur. Corp. v. East Bethlehem Township Mun. Auth., No. 01-240, 2005 U.S. Dist. LEXIS 15447, *51-57 (W.D. Pa. July 29, 2005) (both parties retained experts with respect to trade usage, but neither expert expressed a clear opinion as to whether there was established trade usage of the key term; determining which interpretation was correct was a matter for the jury, not the judge) (attached as Appendix, Tab I).

Because the district court improperly denied the policyholder its constitutional right to a jury trial, this Court should not permit the district court's ruling to stand.

V. Insurance Companies Must Bear the Consequences for Using Imprecise Language When More Precise Language Is Available.

On numerous occasions, Pennsylvania courts have observed that insurers possess more than sufficient expertise to draft policy wording with meticulous care to accomplish the insurers' intended result. E.g., O'Donnell v. Independence Life & Acc. Ins. Co., 229 Pa. Super. 259, 261, 323 A.2d 387, 388 (1974); Beley v.

Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 236, 95 A.2d 202, 205 (1953). Where a question of interpretation could have been avoided through the use of more precise wording, the resulting ambiguity must be construed against the drafter. Borgia v. Prudential Ins. Co., 561 Pa. 434, 750 A.2d 843 (2000); Metzger v. Clifford Realty Corp., 327 Pa. Super. 377, 388, 476 A.2d 1, 6 (1984) (in determining whether there is an ambiguity, court may consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question); Celley v. Mut. Benefit Health & Accident Ass'n, 229 Pa. Super. 475, 482, 324 A.2d 430, 434 (1974 (same).

Applying the same principle, this Court has found ambiguity in an insurance policy where the policy omits language that is included in other contemporaneous policies. In C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479 (3d Cir. 1981), the Court addressed a situation where an insurer failed to use a form that clearly imposed a reporting requirement as a precedent to coverage. According to this Court, the failure to use the form:

> is of probative value in interpreting the policy because it demonstrates that "different and more explicit language could have easily been used to express clearly and unequivocally (the insurer's) intent."

640 F.2d at 482, quoting Buntin v. Cont'l Ins. Co., 583 F.2d 1201, 1206 (3d Cir. 1978). The Court therefore held that the policy was ambiguous. To support this holding, the Court cited the decision in Consolidation Coal Co., Inc. v. Liberty

Mutual Insurance Co., 406 F. Supp. 1292 (W.D. Pa. 1976), for the proposition that a policy provision is ambiguous if intelligent persons could differ as to its precise meaning and if alternative language would have put that meaning beyond reasonable question. Cf. Celley, 229 Pa. Super. at 482, 324 A.2d at 434 (in determining whether language in an insurance policy is ambiguous, court may consider "whether alternative or more precise language, if used, would have put the matter beyond reasonable question." (citations omitted)).

The policyholder in the instant case presented evidence of more precise wording that was available to the insurers at the time they issued the policies in question. See Appellant's Br. 16-18, 30. Instead of construing the policy wording against the insurers, as required by numerous state and federal decisions, the district court adopted an interpretation that favored the insurers. That ruling violates a well-established principle of policy interpretation, and therefore should be reversed.

VI. Insurance Companies Cannot Adopt an Interpretation that Renders a Policy Provision Meaningless.

When interpreting a contract, "[t]he whole instrument must be taken together in arriving at contractual intent." Murphy v. Duquesne Univ. of the Holy Ghost, 565 Pa. 571, 591, 777 A.2d 418, 429 (2001) (citation omitted). The provisions in a contract must be interpreted so that they are consistent with each other. Atlantic

Richfield Co. v. Razumic, 480 Pa. 366, 372-73, 390 A.2d 736, 739 (1978) (contract "must be interpreted as a whole, giving effect to all its provisions"); In re Trust of Binenstock, 410 Pa. 425, 434, 190 A.2d 288, 293 (1963). Insurance policies are no exceptions. The court must read an insurance policy in its entirety. Riccio v. Amer. Republic Ins., 550 Pa. 254, 264, 705 A.2d 42, 426 (1997); Mellon Bank, N.A. v. Nat'l Union Ins. Co. of Pittsburgh, PA, 768 A.2d 865, 869 (Pa. Super. Ct. 2001).

The interpretation advocated by the insurance companies in the present case, and adopted by the district court, renders the second provision in the asbestosis exclusion mere surplusage. The second provision excludes coverage for claims "arising out of the Insured's membership in the Asbestos Textile Institute." If, as the district court found, the exclusion in the first provision regarding "exposure to . . . asbestosis" applied to all asbestos-related claims, there would be no need for the second provision. The district court's decision therefore violates a basic rule of contract interpretation.

CONCLUSION

For all of the reasons set forth above, this Court should reverse the decision below to avoid trampling important rights of policyholders.

Respectfully submitted,

COHEN & GRIGSBY, P.C.

By _____

Andrew M. Roman
Richard A. Ejzak
Cohen & Grigsby PC
11 Stanwix Street – 15th Floor
Pittsburgh, PA 15222
(412) 297-4900

Amy Bach
United Policyholders
11 Pacific Avenue
No. 262
San Francisco, CA 94111
(415) 343-9990

Attorneys for *Amicus Curiae*, United Policyholders

Dated: January 4, 2008

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE AND LOCAL RULES

I, Richard A. Ejzak, hereby certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. The foregoing brief is in compliance with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, according to the word-counting feature of the word processor used in preparing this brief, it contains 4,146 words, excluding the portions of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in Microsoft Word using the proportionally spaced Times New Roman 14-point font.

4. In accordance with 3d Cr. Local Appellate Rule 31.1, the text of the electronic version of this brief sent via email to electronic_briefs@ca3.uscourts.gov and the text of the hard copies sent to the Court of Court via First Class U.S. mail are identical.

5. The electronic version of this brief sent to the Clerk of Court complies with the virus protection provision of 3rd Cir. L.A.R. 31.1, because it was scanned

for viruses using Symantec AntiVirus, Corporate Version 9.0.0.338, and no virus was detected.

Richard A. Ejzak
Attorney for United Policyholders

Dated: January 4, 2008

APPENDIX

TAB A

Koppers Company, Inc. v. Certain Underwriters at Lloyd's, et al.

Statute of Limitations—Insurance Contract—Exposure Theory, Manifestation Theory, Continuous Trigger Theory—Accrual of Claim

1. In cases involving environmental claims involving multiple insurance companies, multiple insurance policy periods and multiple insurance layers (primary layers and one or more excess layers), the statute of limitations does not perform the same function that it ordinarily performs.

2. The Pennsylvania Supreme Court in *J. H. France Refractories Company v. Allstate Insurance Company,* 626 A.2d 502 (Pa. 1993), an asbestos case, adopted the "continuous trigger" theory for determining when coverage under a policy begins, so that every insurer on the risk at any time during the development of a claim (from exposure through manifestation) had an obligation to indemnify the insured. Thus, in the case of multiple policies, the insured is free to select the policy or policies under which it is to be indemnified.

3. The "continuous trigger" theory should be applied to environmental property damage claims.

4. In a situation involving multiple primary and multiple excess carriers, application of the Supreme Court's ruling in *J. H. France Refractories Company* as well as practical considerations regarding the application of the statute of limitations, require a ruling that an insured need not bring any action against an excess carrier within four years of first incurring an expenditure which triggers excess coverage, where there are other policies to which the insured may look for recovery.

(Joseph H. Bucci)

J. W. Montgomery, III for Koppers Company, Inc.
Patricia B. Santelle for Century Indemnity Company.
Alan T. Silko and *Larry Eaton* for Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies.
No. G.D. 95-11243. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION

Wettick, J.—October 28, 1997—Motions for summary judgment filed by defendants Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies ("Lloyds"), and Century Indemnity Company ("INA") raising the defense of the statute of limitations are the subject of this Opinion and Order of Court.

This is an environmental insurance coverage action in which Koppers alleges that defendants breached their contractual obligations to indemnify Koppers for liabilities arising out of property damage at 106 hazardous waste sites, including Koppers' wood treating facility adjacent to the Feather River in California.

Lloyds'/INA's motions for summary judgment raise statute of limitations defenses only with respect to Koppers' liabilities at the Feather River site. However, my rulings will govern Koppers' claims at numerous other sites.

Koppers owned and operated the Feather River facility at which it released hazardous waste into the environment for a period that began in the 1950s and extended into the

[1] The briefs of Lloyds/INA state that there was detectable contamination of soil and ground water by 1971. For purposes of these summary judgment motions, I will use the later date that is more favorable to Koppers.

1980s. By the early 1980s, Koppers was aware that discharges and dumping at the Feather River facility had contaminated soil and ground water.[1] In 1982, Koppers completed a "Soil Contamination Study" indicating that its plant had contaminated more than 43,000 cubic yards of soil and the ground water; a "Cleanup and Abatement Order" was issued that required Koppers to remove the contaminated soil and to implement a plan to clean up the ground water. In 1986, another "Cleanup and Abatement Order" was issued and Koppers entered into a consent order with the United States Environmental Protection Agency pursuant to which it agreed, *inter alia,* to assume liability for site cleanup.

By December 31, 1982, Koppers had expended more than $145,000 for site cleanup; by the end of 1985, it had expended more than $1.1 million; in 1986, Koppers spent an additional $1,714,271 in connection with remedial activities at Feather River; in 1987, it spent more than $2 million; by 1988 its expenditures had totaled more than $6.2 million; and by July 10, 1991 (this being more than four years prior to July 12, 1995, the date on which this lawsuit was filed), its expenditures for remedial activities at this site had exceeded $9.8 million.

The chart on the next page of this Opinion, Exhibit 1, shows Koppers' property damage coverage for the period from 10/2/53 through 5/1/81.

EXHIBIT 1

KOPPERS COMPANY, INC. PROPERTY DAMAGE COVERAGE – 1953-1987

Lloyds/INA correctly state that Koppers is raising breach of contract claims and that under Pennsylvania law contract claims based on the breach of an insurance agreement are governed by a four-year limitation period. Although their briefs do not specifically raise this argument, Lloyds and INA apparently contend that I should treat Koppers' claims in the same fashion as I would treat the following hypothetical claim:

For 1987, a construction company's insurance coverage included a comprehensive general liability insurance policy (occurrence) with insurance company one—policy limits of $1 million; a first layer excess policy with insurance company two—policy limits of $3 million in excess of the primary coverage (i.e., coverage from $1 million to $4 million); and a second layer excess policy with insurance company three—policy limits of $25 million. In 1987, a fire caused by the negligence of an employee of the construction company destroyed the building that this company was constructing. The construction company sought coverage. The insurance companies denied coverage—it was their position that the owner of the building was an additional named insured and that their policies excluded coverage for any claims of a named insured against another named insured. The position of the insured was that the owner was only an additional insured so the exclusion did not apply.

In 1987, the construction company and the owner entered into an agreement under which the construction company agreed to construct a new building at its expense and the owner agreed to waive any other claims. In 1987, the construction company spent $1 million; in 1988, the construction company spent an additional $3.1 million; in 1989, the construction company completed the building at a total cost of $9 million. The work was finished in December 1989.

In January 1993, the construction company sued insurance company three. The excess policy written by insurance company three contained a provision that liability of the company attaches when the insured or the insured's underlying insurer has paid the amount of the retained limits.

Insurance company three raises the following statute of limitations defense: This lawsuit arises out of a single occurrence. Any damage claims arising out of the occurrence must be brought within four years after any expenditure by the construction company that triggers coverage under insurance company three's excess policy. Coverage was triggered in 1988 when the construction company's total expenditures exceeded $4 million. Consequently, the construction company had to sue within four years after the construction company's expenditures first exceeded $4 million.

Lloyds/INA cite no cases which support the position that in this hypothetical situation an insured that failed to sue within four years to recover its initial losses is barred by the four-year statute of limitations from suing only for additional losses arising out of the same occurrence that were sustained within four years of the filing of the lawsuit. Koppers, on the other hand, cites no cases supporting the position that in this hypothetical situation the statute of limitations does not apply to a lawsuit seeking to recover only losses sustained within four years of the filing of the lawsuit. I am not deciding this issue because of the differences between this hypothetical situation and the present lawsuit.

The present case differs from the above example because the present case involves property damage that was continuous, progressive, and indivisible throughout the relevant policy period.[2] The coverage issues raised by indivisible property damage are best under-

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[2] I agree with the Third Circuit's conclusion in *Koppers Company, Inc. v. Aetna Casualty and Surety Co.*, 98 F.3d 1440, 1450-52 (3d Cir. 1996), that the Pennsylvania Supreme Court's holding in *J.H. France Refractories Co. v. Allstate Insurance Co.*, 626 A.2d 502 (Pa. 1993), will be extended to environmental property damage claims so the insured will not be required to establish that environmental property damage from repeated and continuous exposure to discharges and dumping is a progressive harm that is indivisible. However,

stood through the following example used by the New Jersey Supreme Court in *Owens-Illinois Inc. v. United Insurance Co*, 650 A.2d 974, 979-80 (N.J. 1994).

A group of workers occupied an office building for nine years. For the first three years, the building owner had no liability insurance; it assumed any risk of loss. During the middle three years, the owner was insured under a general liability policy providing $5 million coverage per occurrence. For the remaining three years, the owner was again uninsured. During the first three years, the building's occupants were exposed to asbestos fibers in the ceiling and insulation. All asbestos products were removed by the end of the third year. During the first three years, no occupant of the building manifested any symptoms of any asbestos-related disease. During the fourth, fifth, and sixth years, there was "exposure in residence," meaning that some occupants began to develop breathing problems but no disease was diagnosable. In the final three years, many of the building's occupants were diagnosed with asbestos-related diseases. In the tenth year, thirty people who had worked in the building during the entire nine years raised claims against the owner; they asserted that they were suffering from asbestos-related diseases as a result of their work environment. The owner seeks coverage for all claims from the insurance company which insured the owner for three of the nine years.

The insurance policy contains the standard language under which the insurance company will indemnify the insured for liabilities because of bodily injury or property damage which occurs during the policy period as a result of an accident including continuous or repeated exposure to conditions which result in bodily injury or property damage.

If the trigger of coverage is based on an exposure theory, the date of the injuries which triggers liability for insurance purposes is the date on which the injury producing agent first contacts the person or the property. In this fact situation, there would be no insurance coverage because the contact occurred during the initial three years. If the trigger of coverage is based on a manifestation theory, the injury or property damage does not occur until the disease or property damage can be detected. In this fact situation, there would be no insurance coverage because the disease had not manifested itself during the three years in which there was insurance coverage.

If the trigger of coverage is based on a continuous trigger theory, there is coverage over the entire period from exposure to manifestation. The rationale for this position is that the injury occurs during each phase of the disease or environmental contamination—exposure, progression, and manifestation. Under this theory, there would be coverage for the three years in which the owner was insured.

The continuous trigger theory raises additional issues as to the scope of the coverage. Assume that an office worker obtains a $900,000 judgment against the owner. The insurance company will take the position that it should pay only $300,000 because the injury should be apportioned over the nine-year period from exposure to manifestation. The insured, on the other hand, will take the position that this indivisible injury arose during the policy period; the insurance policy provides that the insurer will fully indemnify the insured for the full amount of liability arising out of bodily injury occurring during the policy period (subject to the policy limits); thus, the insurer must indemnify the insured for the full amount of the office worker's judgment against the insured.

There are variations to the argument that an insurance company writing insurance for one year of the nine-year period is only one-ninth liable. For example, apportionment may be based on policy limits. This means that if there was insurance coverage of $1 million per year for the first three years, $2 million per year for the second three years, and $3 million per year for the third three years, insurance companies for the first three years

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[2] even if the insured is required to present evidence supporting this finding, for purposes of these summary judgment motions, I must assume that Koppers will introduce evidence which supports its position that property damage in this case was continuous, progressive, and indivisible throughout the relevant policy periods.

would be liable for three-eighteenths of the claim, insurance companies for the next three years would be liable for six-eighteenths of the claim, and insurance companies for the final three years would be liable for nine-eighteenths of the claim. See *Owens-Illinois, Inc. v. United Insurance Co., supra,* 650 A.2d at 993-95.

Where there are underlying comprehensive general liability insurance and layers of excess insurance, other apportionment issues arise. For example, assume that the law of the jurisdiction provides that each insurance company is fully liable (within the policy limits) if it wrote insurance for any year from the date of exposure to the date of manifestation. Assume the following fact situation: The period from exposure to manifestation runs from 1980 to 1984. The following insurance was in place: 1980—$1 million general liability policy; 1981—$1 million general liability policy; 1982—$1 million general liability policy; 1983—$1 million general liability policy, a first layer excess policy covering losses from $1 to $2 million, and a second layer excess policy covering losses from $2 million to $15 million; 1984—$1 million general liability coverage, a first layer excess policy covering losses from $1 million to $15 million.

A $4 million judgment is entered against the insured. The insured seeks to utilize the 1983 policies under which the general liability carrier would pay $1 million; the first excess carrier would pay the next million dollars; and the second excess carrier would pay the remaining $2 million. The first layer excess carrier will take the position that it is an excess carrier and the primary insurance coverage for each year from 1980 to 1984 is available. Consequently, the insured cannot proceed against the excess carrier.

If the recovery is for $12 million instead of $4 million, the second layer excess carrier will take the position that it is a second layer excess carrier. Consequently, the insured is required to recover $5 million under the general liability policies, $1 million from the 1983 first layer excess carrier, and the remainder from the 1984 first layer excess carrier.

In *J.H. France Refractories Company v. Allstate Insurance Co., supra,* 626 A.2d 502, the Pennsylvania Supreme Court addressed the theory of coverage question. In that case, the insured—a manufacturer and distributor of asbestos products over several decades—was sued by a person who allegedly suffered from asbestos-related diseases contracted through exposure to the insured's products from 1948 through 1978. Various insurance companies had provided comprehensive general liability insurance coverage for a portion of the period. For many years, the insured did not have insuranee coverage.

In this declaratory judgment action, the Pennsylvania Supreme Court adopted the continuous trigger (multiple trigger) theory of liability. The Court held that every insurer which was on the risk at any time during the development of the claimant's asbestos-related diseases had an obligation to indemnify the insured.

The Court next considered the argument of the insurance companies (adopted by the Pennsylvania Superior Court) that the insurance companies' obligation to indemnify was on a pro rata basis apportioned according to the amount of time each policy was in effect (including an obligation of J.H. France to act as a self-insurer during the period when it was uninsured). The Supreme Court rejected that argument. It said that each insurer which was on the risk during the development of asbestos-related diseases is an insurer of the entire risk, so "J.H. France should be free to select the policy or policies under which it is to be indemnified." *Id.* at 508. The Court said:

> When the policy limits of a given insurer are exhausted, J.H. France is entitled to seek indemnification from any of the remaining insurers which was on the risk during the development of the disease. Any policy in effect during the period from exposure through manifestation must indemnify the insured until its coverage is exhausted. We believe this resolution of the allocation of liability issue to be most consistent with the multiple-trigger theory of liability.
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> This conclusion does not alter the rules of contribution or the pro-

> visions of "other insurance" clauses in the applicable policies. There is no bar against an insurer obtaining a share of an indemnification or defense costs from other insurers under "other insurance" clauses or under the equitable doctrine of contribution. *Id.* at 509.

I now consider Lloyds'/INA's argument that this lawsuit was not timely filed.[3] My discussion will consider the INA policies. INA issued first layer excess insurance policies for the periods from 1/1/60-1/1/63 and 1/1/63-1/1/66. For these periods, Aetna provided primary general liability coverage; its policy limits were $50,000. INA provided insurance for the next $1 million dollars.

INA argues that Koppers' lawsuit against INA should be treated in the same fashion as the hypothetical claim described at pages 4-6 (162-163 PLJ) of this Opinion. Under each INA policy, INA has a duty to indemnify Koppers for the Feather River damages as soon as Koppers pays the full amount of the underlying limits. According to INA, the underlying limits are $50,000 per policy, and Koppers did not bring this lawsuit until more than twelve years after it made payments in excess of $100,000 for the cleanup activities at Feather River.

There is a significant legal issue as to whether Koppers may raise claims for the Feather River damages under the INA policies as soon as Koppers has paid more than $100,000 for cleanup activities. Under *J.H. France Refractories Co.*, Koppers may seek recovery against any primary general liability insurance company that provided insurance between the date of exposure and the date of manifestation. Between 1953 and 1981, there was primary coverage in excess of $23 million. The INA policies appear to provide coverage only after the insured exhausts the underlying policies; the underlying insurance may include any primary general liability coverage that would cover this claim (i.e., horizontal exhaustion).[4] See *Community Redevelopment Agency v. Aetna Casualty and Surety Co.*, 57 Cal.Rptr.2d 755 (Cal. Ct. App. 1996); *Missouri Pacific Railroad Co. v. International Insurance Company*, 679 N.E.2d 801 (Ill. App. Ct. 1997). Compare *Koppers Company, Inc. v. Aetna Casualty and Surety Company, supra*, 98 F.3d 1440 (Koppers/Lloyds took the opposite legal positions in that case); *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Surety Co.*,___ F. Supp. ___, 1997 W.L. 580583, pages 10-12 (D.N.J. 1997).

Not surprisingly, the parties' briefs spent very little time on this issue. Over the long haul, in all likelihood, the excess insurance carriers favor a ruling that the insured must proceed against all primary liability carriers before seeking excess coverage while Koppers favors the opposite position.

Even if Pennsylvania law and/or the terms of the policies permit the insured to proceed against an excess carrier after exhausting only the limits of the underlying policies

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[3] The parties have not cited any cases that have considered the applicability of the statute of limitations in an environmental insurance coverage action in a jurisdiction using a continuous trigger theory. Since their briefs involving other issues in this litigation include, along with opinions appearing in the federal and state reporters, numerous other memoranda, rulings and court orders, I assume that this statute of limitations issue has not been the subject of many court rulings.

[4] The parties did not address the issue of the language of the INA policies. My preliminary research indicates that the INA policies state that INA is liable only after the insured's liability exceeds the limits of any underlying insurance. See Section III.(b)(2) of the 1960-1963 Policy and Section IV.(a) of the 1963-1966 Policy. Furthermore, INA apparently denied coverage as late as March 1995 on the ground that Koppers was required to exhaust horizontal primary insurance coverage. See Exhibit J. Koppers Memorandum in Opposition to INA's and INA's Joinder to London Insurers' Motion for Partial Summary Judgment on Statute of Limitations.

covering the same policy period (i.e., vertical exhaustion), defendants are not entitled to a summary judgment on their statute of limitations defense because a construction of the statute of limitations in a manner favored by Lloyds/INA would be inconsistent with the Pennsylvania Supreme Court's ruling in *J.H. France Refractories Co.*

Koppers had unreimbursed expenditures for the Feather River cleanup of approximately $10 million as of July 10, 1991. Under *J.H. France Refractories Co.* Koppers was given numerous insurance options. In *J.H. France Refractories Co.*, the Supreme Court ruled that the insured should be free to select the policy or policies under which it is to be indemnified. 626 A.2d at 508. "When the policy limits of a given insurer are exhausted, J.H. France is entitled to seek indemnification from any of the remaining insurers which was on the risk during the development of the disease." *Id.* at 509.

If I were to adopt the position of Lloyds/INA, the insured would not have options. It would be required within four years of an expenditure to proceed against every insurance company that may be obligated to provide coverage under *J.H. France Refractories Co.*, This case involves 106 sites and more than 40 insurance policies. For many, if not most of the sites, Koppers has been making cleanup payments. For many, if not most of the sites, Koppers will continue to spend money for cleanup activities. The purpose of the Supreme Court's ruling in *J.H. France Refractories* was to permit Koppers to decide how it could maximize coverage.[5] Under *J.H. France Refractories,* it is Koppers, rather than INA, that may decide the order in which the various policies will pay Koppers' claims. A ruling that imposes upon Koppers the duty to sue any insurance company that might have any legal obligation to provide coverage within four years of any expenditure that may trigger coverage would undermine the *J.H. France Refractories* ruling by taking away Koppers' ability to decide which policies will pay Koppers' claims.

Assuming that the period from exposure to manifestation may run from 1/1/60 to 5/1/81, a $1,050,001 expenditure that Koppers made for cleaning up the Feather River site would trigger coverage under twelve primary property damage policies and (assuming that only underlying primary coverage must be exhausted) six excess policies. The total coverage for these eighteen policies exceeds $50 million. This means that if I were to adopt the position of Lloyds/INA, Koppers must bring lawsuits on each of the eighteen policies within four years of this expenditure in order to avoid the defense that Koppers is barred by the four-year statute of limitations from bringing at any time any Feather River claims against any of these companies. Koppers would be in a similar position with respect to the other 105 sites. Thus, under the Lloyds/INA position, as a practical matter, Koppers cannot make decisions as to how it would like to allocate its insurance claims among the various carriers. If claims are not fully resolved within four years of an expenditure, Koppers must sue on every policy.

The resolution of the issue of when a claim accrues involves considerations of public policy. See *Darien Capital Management, Inc. v. Commonwealth of Pennsylvania,* ___ A.2d ___, 1997 W.L. 471979 (Pa. 1997), where the Supreme Court ruled that for public policy reasons the six-month statute of limitations governing contract claims against the Commonwealth does not begin to accrue as soon as a party is able to litigate the claim. The Court said that "[c]ommon sense dictates no less." *Id.* at page 4. The Commonwealth's proposed construction of the statute of limitations "would be tantamount to encouraging unnecessary litigation, something that this court is loathe to do." *Id.*

I agree with the statement of the New Jersey Supreme Court in *Owens-Illinois, Inc. v. United Insurance Co., supra,* 650 A.2d at 993, that courts must develop rules for complex environmental litigation that are easy to apply with an eye to reducing litigation costs and encouraging the prompt settlement of claims. A ruling which requires Koppers to bring a

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[5] In *J.H. France Refractories,* each insurance carrier was providing primary coverage. Consequently, *J.H. France Refractories* did not consider whether the insured may proceed against any excess carrier before it has exhausted all primary coverage.

lawsuit raising claims under eighteen insurance policies whenever damages at a particular site exceed $1,050,001 would achieve the opposite result

The Lloyds/INA argument assumes a static situation that does not involve other lawsuits and the settlement of claims with other insurance companies. Assume that Koppers made an initial expenditure of $1 million in 1989 for cleanup activity at a site covered by the block of insurance described at page 3 (PLJ 161) of this Opinion and that Koppers never sued INA for indemnification for these expenditures. However, Koppers instituted a lawsuit in 1990 against another insurance company that in 1995 resulted in the recovery of the $1 million claim from this other company. Upon receipt of the 1995 payment, Koppers would not be permitted to raise claims against INA for this expenditure because it cannot look to INA's policy to recover damages that were received from another insurance company. See *Gould v. Continental Casualty Co.*, 585 A.2d 16 (Pa. Super. 1991). Yet, under INA's interpretation of the statute of limitations that is based on the example described at pages 4-6 (PLJ 162-163) of this Opinion, Koppers could not sue INA to recover any additional future payments for cleanup activities at that site because of its failure to sue INA within four years to recover this unpaid claim (which another insurance company eventually paid).

In the present case, INA and Lloyds state that the statute of limitations has run because Koppers had expended approximately $10 million for cleanup activities at the Feather River site by July 10, 1991, this being more than four years prior to the institution of this lawsuit. However, in a federal action, Koppers recovered more than $13 million for the Feather River site under other insurance policies.[6] Consequently, the damages which Koppers seeks to recover in this lawsuit do not involve the expenditures that Lloyds/INA are utilizing to support their argument that this lawsuit is barred by the statute of limitations.

INA provided $1 million excess coverage for 1960-1963 and $1 million excess coverage for 1963-1966. The underlying coverage for each of these policy periods was $50,000. If Koppers expended $100,001 in 1987, INA apparently asserts that Koppers was required to bring lawsuits raising claims under both INA policies prior to 1992 (even though the coverage provided under either policy is more than sufficient). If Koppers had sued INA under one policy only, INA contends that the statute of limitations defense bars Koppers from seeking any damages for the Feather River site under the second policy. This would result in an application of the statute of limitations that produces results that are unreasonable and unfair. See *Sicola v. First National Bank of Altoona*, 170 A.2d 584, 585 (Pa. 1961) (statute of limitations "must be read in the light of common sense and reason, and that the Legislature is presumed not to intend unreasonable or absurd results").

In this Opinion, I am not suggesting that the statute of limitations never applies to environmental insurance coverage claims. If, for example, the period from exposure through manifestation is 1984-1987, if the insured operates only a single site, and if there is a single excess policy which provides coverage for claims in excess of $100,000, the insured must proceed against the insurer within four years of a judgment in excess of $100,000 because in this case the insured has no other choices. If Koppers had only eight sites and if it had completed the cleanup activities at each of the eight sites, Koppers would have four years following the final cleanup in which to sue any insurance carriers. Also, once Koppers has completed its cleanup activities at the Feather River site, Koppers may be obligated to sue within four years of the date of its final expenditure.

This case involves environmental claims against insurance companies. In an insurance setting, the statute of limitations does not perform the same function that it ordinarily performs. If an insurance company wants to know of any potential claims, the insurance contracts will contain notice requirements. In most excess policies—including the INA and

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[6]Upon remand, the damage recovery will be reduced by the amount of money that Koppers already received through settlement.

Lloyds excess policies—the carriers are not asking to be sued promptly after the occurrence. To the contrary, the insurance policies contain clauses that prevent the excess carrier from being included in litigation until the entry of a judgment or payment of the amount of the limits of the underlying policies. Consequently, a reading of the statute of limitations that is consistent with the purposes of the *J.H. France Refractories Co.* ruling does not result in insurance companies being asked to provide coverage for claims about which they have almost no familiarity.

For these reasons, I enter the following order of court:

ORDER OF COURT

On this 28th day of October, 1997, it is hereby ORDERED that the motions for summary judgment filed by Certain Underwriters at Lloyd's, London, Certain London Market Insurers, and Century Indemnity Company raising the defense of the statute of limitations are dismissed.

BY THE COURT
/s/Wettick, J.

TAB B

INDIANA GAS COMPANY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FILED
DEC 15 1995
STEPHEN [illegible] CLERK
NORTHERN DISTRICT OF INDIANA

INDIANA GAS COMPANY, et al.,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,

Defendants.

CAUSE NO.: 1:95CV0101

ORDER

This matter comes before the Court on the Plaintiff's, Indiana Gas, motion to compel discovery, filed on November 13, 1995. On November 27, 1995, the Defendant Home Insurance Company ("Home") filed an answer brief in opposition to the motion in which Travelers Insurance Company joined. On November 28, 1995, Aetna Casualty and Surety Company ("Aetna") joined Home in response to the motion. On December 1, 1995, Indiana Gas responded to Aetna's joinder and filed its reply brief to Home's response. On December 8, 1995, St. Paul Fire and Marine Insurance Company and St. Paul Surplus Lines Insurance Company joined in Home's response. Oral argument was heard on this motion on December 14, 1995 at 1:00 p.m. This order will more formally memorialize the order made during that proceeding.

For the reasons stated on the record, IT IS ORDERED that Indiana Gas's motion to compel drafting history documents is GRANTED. The Court took under advisement the question as to when, if ever, the Defendants must produce the drafting history documents surrounding the "pollution exclusion." More particularly, Defendants cite *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir. 1994) for the proposition that under Indiana law, the meaning of the "pollution exclusion" is unambiguous. Therefore, applying the rationale expressed in *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), they conclude that they should not be required to produce such materials because they constitute extrinsic evidence that cannot be considered when a policy term is unambiguous. Notably, the Indiana Supreme Court will shortly have an opportunity to rule on this issue for the first time in *American States Ins. Co. v. Kiger*, No. 32S05-9409-CV-836. Until such a definitive ruling is obtained, discovery of information related to this clause remains reasonably calculated to lead to admissible evidence. Moreover, the Court is concerned with facilitating the timetable of this case given the relatively short time remaining for discovery. If, as the Defendants hope, the Indiana Supreme Court rules that the policy term is unambiguous, then the utility of the drafting history documents will be in doubt. However, if the ruling is to the contrary, then the Court will have facilitated discovery on that point—an issue clearly discoverable and seemingly admissible. Consequently, no stay on this facet of discovery will be ordered.

IT IS ORDERED that Indiana Gas's motion to compel information and documents relating to treatment of manufactured gas plant ("MGP") claims is GRANTED. The Court agrees that production of information relating to the ten earliest and ten most recent claims, where applicable, will assure a random production of claims. Those Defendants for whom the "ten-ten" rule would prove unduly burdensome are directed to fashion an alternative means of random production of such claims. If there is a dispute regarding the fashioned response, counsel shall conduct a N.D. Ind. Loc. R. 37.1 conference before bringing a further motion to the Court.

IT IS ORDERED that Indiana Gas's motion to compel discovery of reinsurance documents and corresponding communications between Defendants and their reinsurers is

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

INDIANA GAS COMPANY, INC. et al.,

Plaintiffs,

v.

AETNA CASUALTY & SURETY COMPANY, et al.,

Defendants.

CAUSE NO. 1:95CV101

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on defendant Home Insurance Company's (Home) January 2, 1996, "Request for Review of Magistrate Judge's Discovery Order" together with accompanying memorandum of law. Assorted other defendants have filed notices joining in that request. By way of that request, defendant Home requests that this Court enter an Order setting aside a December 15, 1995 Order of Magistrate Judge Cosbey. Plaintiffs Indiana Gas Company, Inc., Richmond Gas Corporation and Terre Haute Gas Corporation (collectively Indiana Gas) filed a response to that motion on January 12, 1996. For the following reasons, the request filed by defendant Home will be denied.

Discussion

The present request is directed at an Order entered by Magistrate Judge Cosbey granting plaintiffs' motion to compel drafting history documents; granting plaintiffs' motion to

GRANTED, except, of course, for any alleged privileged communications between the Defendants and their reinsurers. If the Defendants claim privileged communications, they shall file a motion for a protective order along with a privilege log ("Vaughn Index") with the Court, subject, of course, to a prior N.D. Ind. Loc. R. 37.1 and Fed. R. Civ. P. 26(c) conference.

IT IS ORDERED that Indiana Gas's motion to compel discovery of deposition transcripts (or, alternatively, a list of depositions and protective orders) from previous litigation involving MGP claims is GRANTED. To the extent that the deposition testimony is subject to protective orders imposed by other courts, Indiana Gas shall first seek the permission of those courts for access to, and use of, these deposition transcripts.

Enter this 15th day of December, 1995.

Roger B. Cosbey
United States Magistrate Judge

compel information and documents relating to treatment of manufactured gas plant (MGP) claims; granting plaintiffs' motion to compel discovery of reinsurance documents and corresponding communications between defendants and their reinsurers (save those that are privileged in which case defendants were to file a motion for a protective order along with a privilege log); and plaintiffs' motion to compel discovery deposition transcripts (or, alternatively, a list of depositions and protective orders) from previous litigation involving MGP claims. Given the deferential standard employed in assessing a Magistrate Judge's ruling on discovery matters, and further given the fact that each of Magistrate Judge Cosby's rulings are supported by abundant authority, Home's request to vacate the granting of the motion to compel filed by the plaintiffs must be denied.

This Court's review of the Magistrate Judge's Order is governed by Rule 72(a) of the Federal Rules of Civil Procedure and by 28 U.S.C. § 636(b)(1)(A). Under both the rule and the statute, a district court shall reverse a magistrate judge's findings as to nondispositive matters only if they are "clearly erroneous or contrary to law." *Id.*[1] "This standard has been consistently applied to afford magistrates broad discretion in resolving discovery matters." *Union Industries v. Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071 (S.D.N.Y. 1990)(collecting cases), *rev'd on other grds.*, 907 F.2d 742 (2nd Cir. 1992). "Because a magistrate is afforded broad discretion in the resolution of non-dispositive discovery disputes, the court will overrule the magistrate's determination only if this discretion is abused." *Centaur v. Rapp*, 810 F.Supp. 1127, 1167 (D. Kan. 1992).

"It is improper for an objecting party to attempt to relitigate the entire content of the hearing before the Magistrate Judge by submitting papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge." *Camardo v. Gist Heavily Rate Employer Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992). "[P]arties are not to be afforded a 'second bite at the apple' when they file objections...as the 'goal of the federal statute providing for the assignment of cases to magistrates is to increase the overall efficiency of the federal judiciary.'" *Id. quoting McCarthy v. Manson*, 554 F. Supp. 1275, 1286 (D. Conn. 1982) *aff'd.*, 714 F.2d 234 (2d Cir. 1983).[2]

Despite the salutary purpose of both 28 U.S.C. § 636(b)(1)(A) and F.R. Civ. P. 72(a), Home attempts to relitigate in its entirety the arguments raised before Magistrate Judge Cosby. Indeed, its brief before this Court (save for a six page introduction) is virtually identical to that presented in opposition to plaintiffs' motion to compel before Magistrate Judge Cosby. It repeats such argument previously cited and apparently raises no new arguments. It cites no binding authority overlooked by Magistrate Judge Cosby and it identifies no fact ignored or misconstrued. Certainly, such broad-based sweeping objections with only passing reference to the standard of review are not in keeping with the foregoing statute and rule and for this reason alone should be rejected by this Court. *See, Travelers Insurance Co. v. Charles Mangurian*, 1995 U.S. Dist LEXIS 14783 (W.D.N.Y Sept. 8, 1995).

Quite apart from the inadequacy as to the form of the objections raised by Home, it is clear that under the appropriate standard of review, the Order entered by Magistrate Judge Cosby must be upheld. Each of his rulings are neither clearly erroneous nor contrary to law.

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[1] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541 (1948).

[2] *See also, Ford Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 602, 605 (1st Cir. 1980)("The purpose of the Federal Magistrates Act is to relieve courts of unnecessary work").

There is abundant case law to support Magistrate Judge Cosbey's decision to order production of drafting history and other interpretative documents. Indeed, the United States District Court for the Northern District of Georgia and the United States District Court for the Western District of Wisconsin have ordered Home to produce drafting history documents on MPG claims similar to those at issue here. *Atlanta Gas Light Co. v. Aetna Casualty and Surety Co.*, No. 1:91-CV-1603RLV (N.D. Ga. May 13, 1992); *Wisconsin Gas Co. v. Aetna Casualty & Surety Co.*, No. 94-C-87-S (W.D. Wis. Sept. 2, 1994). Numerous other federal and state courts have relied on drafting history documents in resolving coverage disputes. *See, e.g., Elgar Mfg. v. Liberty Mutual Ins. Co.*, 972 F.2d 805, 810 (7th Cir. 1992); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1198 (3d Cir. 1991), *Montrose Chemical Corp. of Calif. v. Admiral Ins. Corp.*, 897 P. 2d 1, 14 (Cal. 1995)(in bank)("Most courts and commentators have recognized that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues"). The plethora of authority to support the Magistrate Judge's conclusion on this issue by definition means that his ruling was not clearly erroneous or contrary to law.[1]

Similarly, there is authority to support Magistrate Judge Cosbey's decision to order production of the ten earliest and ten most recent MGP claims. *See Nestle Foods Corp, supra* 135

[1] The three new cases cited by Home in its brief before this Court are not on point since they deal with admissibility and not discoverability. As was pointed out in *Nestle Foods Corp. v. Aetna Casualty and Surety Co.*, 135 F.R.D. 101, 105 (D.N.J. 1990) "[d]efendants position that such evidence would be inadmissible at trial is not the standard by which relevancy for discovery purposes is measure." Moreover, and contrary to Home's apparent contention, the pollution exclusion issue is not settled as a matter of Indiana law and, as the Magistrate Judge observed, is presently before the Indiana Supreme Court in *American States Ins. v. Kiger*, No. 32S05-9409-CV-836. Given the pendency of that appeal, it was well within Magistrate Judge Cosbey's discretion to conclude that it was important to facilitate the timetable for discovery in this case.

F.R.D. 106-7 (recognizing abundant state decisions to support the proposition that prior claims are discoverable in affirming Magistrate's order compelling the production of the defendant insurer's ten earliest and ten most recent claims files); *see also, National Union Fire Ins. Co. v. Stauffer Chemical Co.*, 558 A.2d 1091 (Del Superior Ct., 1989)(collecting pro and contra cases). While Home does not seriously dispute the existence of authority for the proposition that claims files may be discoverable, it does attempt to relitigate its position that such documents are irrelevant given its notice defense. It is, however, conceivable that other MGP claims will show that Home would not have acted differently with early notice from plaintiffs. As such, it cannot be said that the Magistrate's apparent finding in favor of plaintiffs on this issue was clearly erroneous or contrary to law.

Likewise, authority can be found to support Magistrate Judge Cosbey's decision to order production of reinsurance documents and corresponding communications between defendants and their reinsurers. In fact, the only decision cited by either party directly discussing the applicability of Rule 26(a)(1)(D) supports the discoverability of reinsurance documents. In *Missouri Pacific Railroad v. Aetna Casualty Ins Co.*, 3-93-CV-1898-D [May Order](N.D. Tex. May 17, 1995) the court wrote that "discovery of reinsurance agreements is clearly authorized, if not required, by the Federal Rules of Civil Procedure since by definition such policies would render a reinsurer liable for all or part of an adverse judgment entered against the primary insurer which obtained the reinsurance policy." *Id.* at p. 4. Quite apart from new rule 26(a)(1)(D), other courts have found that reinsurance documents and corresponding communications are relevant and discoverable. *See, e.g., Rhone Poulenc Rorer, Inc. v. Home Indemnity Co.*, 24 Fed. R. Serv. 3d 762, 764 (E.D.Pa., 1991). Here, Home does not dispute the existence of such authority but instead attempts to relitigate that which

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was considered by the Magistrate Judge. There is no showing that the Order by the Magistrate Judge on this issue was clearly erroneous or contrary to law.

Finally, there is ample support for the Magistrate Judge's conclusion that Indiana Gas is entitled to discover deposition transcripts (or, alternatively, a list of depositions and protective orders) from previous litigation involving MGP claims since "[u]sing fruits of discovery from one lawsuit in another litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure." *Manville Forest*, supra 129 F.R.D. at 449. *See, Aetna Gas, supra*, slip op. at p. 5 (insurer required to identify cases where similar claims made and where transcript of deposition not filed as of record to produce copies of transcript); *Carey-Canada Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 246 (D.D.C. 1988)(defendants required to produce deposition transcripts and exhibits from similar coverage cases). Rather than disputing the existence of such authority, Home is attempting to relitigate the issue of whether those transcripts can be ordered when they are subject to protective orders in other courts. Such veiled attempts to insulate the testimony of its employees is improper since the plaintiffs have indicated a willingness to abide by the relevant protective orders and more importantly since Magistrate Judge Cosbey ordered that Indiana Gas shall first seek the permission of the courts which entered protective orders for access to, and use of, the deposition transcripts. There has been no showing as to how that conclusion is erroneous or contrary to law.

Conclusion

On the basis of the foregoing, defendant Home Insurance Company's January 2, 1995 request that this Court enter an Order setting aside the December 15, 1995 Order of Magistrate Judge Cosbey is DENIED. Insofar as defendant Home Insurance Company is objecting to that Order, said

objections are overruled.

SO ORDERED this 17 day of January 1996.

William C. Lee
United States District Judge

TAB C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN GAS COMPANY,

Plaintiff,

v.

AETNA CASUALTY & SURETY COMPANY, AMERICAN EMPLOYERS' INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, FIRST STATE INSURANCE COMPANY. HIGHLANDS INSURANCE COMPANY, THE HOME INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, INTERNATIONAL SURPLUS LINES INSURANCE COMPANY. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, CERTAIN LONDON MARKET INSURANCE COMPANIES, ASSOCIATED ELECTRIC AND GAS INSURANCE SERVICES, LIMITED and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Defendants.

ORDER

94-C-87-S

Plaintiff's motions to compel discovery and motion of London Market Insurers came on to be heard by telephone in the above entitled matter on August 31, 1994, the plaintiff having appeared by Michael, Best & Friedrich, by Raymond R. Krueger, and Howrey & Simon, by Edward P. Henneberry; defendant Aetna Casualty & Surety Company by Burditt, Bowles & Radzius, by Jeffrey Kaser, and Hinshaw & Culbertson, by Mark W. Rattan; defendant American Employers' Insurance Company by Schallinger & Doyle, by Timothy J. Strattner; defendant Continental Casualty Company by Haskell & Perrin, by

Copy of this document has been mailed to the following: Attys. Krueger, Henneberry, Kaser, Rattan, Strattner, Piardlonock, Klees, Fitzpatrick, Soderstrom, Bowman, Schwartzbart, Hazelwood, Rose, Schneckpeper, Roberts, Bryan, Bohl, Zamloch, Lee and Reilly this 2nd day of September, 1994.

By: Debi Blaschka
Secretary to Judge John C. Shabaz

Schneider; defendant Continental Casualty Company by Haskell & Perrin, by David W. Pierdionock, and Coyne, Niess, Schultz, Becker & Bauer, by Richard G. Niess; defendant First State Insurance Company by Brennan, Steil, Basting & MacDougall, by Michael R. Fitzpatrick; defendant Highlands Insurance Company by Lee, Kilkelly, Paulson & Kabaker, by Paul Schwarzenbart; defendant Home Insurance Company by Steptoe & Johnson, by Harry Lee; defendant International Insurance Company and International Surplus Lines Insurance by Bollinger, Ruberry & Garvey, by Mitchell D. Rose; defendants Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies by Mendes & Mount, by Stephen T. Roberts; and defendant London Market Insurance Co. by Hippenmeyer, Reilly & Moodie, by Paul F. Reilly. The Hon. John C. Shabaz, District Judge, presided.

ORDER

IT IS ORDERED that plaintiff's motion to compel production of drafting history and other interpretive documents by defendant Home Insurance Company is GRANTED.

IT IS FURTHER ORDERED that said documents shall be produced forthwith, where said defendant claims privilege said documents shall be submitted for in camera examination and any confidentiality concerns are to be addressed by an appropriate protective order, not by nondisclosure.

IT IS FURTHER ORDERED that plaintiff's motion to compel answers to interrogatories and production of documents by defendant London Market Insurers relating to the handling of other MGP claims

is GRANTED, the production of only the first and last ten claims is not an undue burden; said documents shall be produced forthwith, the parties to ensure where appropriate that the confidential materials involving third parties be addressed by a protective order, not nondisclosure.

IT IS FURTHER ORDERED that London's motion for a protective order involving pending depositions is DENIED and its concerns may instead be addressed pursuant to an appropriate protective order.

Entered this 2nd day of September, 1994.

BY THE COURT:

JOHN C. SHABAZ
District Judge

TAB D

PFIZER, INC. SUPERIOR COURT OF NEW JERSEY

MIDDLESEX COUNTY
Plaintiff CHANCERY DIVISION

vs. DOCKET NO. MID C-108-92

EMPLOYERS INSURANCE OF WAUSAU
et. al.

Defendants RECOMMENDATION AND STATEMENT OF REASONS

RECOMMENDATION

These cross motions to compel discovery have been referred to me by Judge Harding. Plaintiff, Pfizer, Inc., a pharmaceutical manufacturer is seeking coverage from its primary and excess comprehensive general liability insurers for environmental claims against Pfizer arising out of its waste disposal at eighty three (83) sites. Defendants, the insurers dispute coverage.

In its motion, plaintiff seeks the production of documents from 1945 to the present containing drafting history and interpretative statements as to each "key policy provision", statements made to governmental regulatory bodies regarding the "key policy provisions", communications by the insurers with institutional insurance company coverage associations, advertising and promotional material, manuals, guidelines, internal operating documents, responses to similar claims by other policy holders, reinsurance information, loss reserve information, defendants' position in other coverage litigation and defendants' knowledge of the potential liabilities it contracted to cover. I shall discuss each request in turn.

For its part, the defendant carriers seek answers to interrogatories and documents regarding the plaintiff's corporate knowledge of the risks of environmental pollution as well as various site specific information, the EPA site identification numbers and information on plaintiff's mitigation efforts, its communication with governmental entities, the settlements reached and the judgments entered in the underlying environmental actions, any civil or criminal fines imposed and Pfizer's use of chemicals. Pfizer maintains that it has answered all of the site specific information with its summaries of November 14, 1994 and the supplement to those site summaries, dated February 2, 1995. Defendant Commercial Union, in its reply brief states that it does not expect all responsive documents immediately (Drb 1). Rather it hopes to "build a common sense framework for the efficient discovery of relevant evidence..."

Although acknowledging the receipt of the amended site summaries, the defendants have not withdrawn any portion of their motion.

The parties herein have construed their discovery obligations narrowly; plaintiff restricting discovery to its legal division files and certain risk management files; defendants producing their claims files as to Pfizer. Each party seeks information beyond those self imposed confines and some of that discovery should prove useful provided the burden of producing it is overcome. The standard of relevance for discovery extends to any information reasonably calculated to lead to the discovery of admissible evidence. R. 4:10-2 (a) Nevertheless it must be confined to information having some bearing on the claims advanced. Korostynski v. State Division of Gaming 266 N.J. Super. 549, 555 (App. Div. 1993).

Subject to the specific limitations imposed in the Statement to follow, I RECOMMEND that the following document requests of the plaintiff be granted: ¶4, 6, 7, 8, 11, 13, 16, 17, 18, 23, 24, 25, 26, 33, 34, 37, 41, 44. Further, the following requests are stricken: ¶9, 19, 38, 39, 40. Production of these documents are to be made by May 15, 1995.

As to defendant's joint motion to compel, I recommend that responses be given to Interrogatories Nos. 10, 15, 16, 33, 34, 35, 39, 95 and Document Request No. 14. However, some of these responses are limited in scope. Interrogatory Nos. 16, 34 and 35 are limited to manufactured products or chemicals disposed of by the plaintiff at the identified sites. No. 95 applies solely to the policies in issue. All defendants who have joined in the joint motion are entitled to the same information as to their policies. This recommendation takes care of the interrogatories and document production addressed to corporate knowledge and use of chemicals. Again, these responses are to be made by May 15, 1995.

The site specific information is still sought but defense counsel have not had a chance to digest the amended site summaries provided by plaintiff. Therefore, I shall defer any recommendation with respect to these items. Plaintiff has not objected to the form or to the substance of these discovery requests, but claims that all of the information has been provided. I expect that any inadequacy can be remedied by the parties informally.

Finally, the defendants complain that Pfizer has provided a massive amount of documents without an index. Plaintiff responds that it has segregated this information by site and in any event, R 4:17-4 (d) governs because ..."the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served...". I disagree that R 4:17-4 (d) permits a responding party to make a mass of documents available and expect the interrogating party to determine which document responds to which interrogatory. See Comments to R.

4:17-4 (d). However, again, I defer to the parties, who have arranged "meet and confer" sessions to bridge this deficiency. Should these conciliation efforts fail, then defendants may apply for relief citing the specific deficiencies which remain.

Statement of Reasons

Plaintiff's Motion to Compel

A. Drafting History - Requests # 4, 8, 11

Plaintiff seeks drafting history for a host of phrases and paragraphs set forth in its definition of "key policy provisions". Defendants argue that plaintiff has failed to delineate the policy language in dispute, that the Commercial Union (CUb7) and Wausau (Wb4) policies have no pollution exclusion provision and that drafting history is irrelevant because extrinsic evidence cannot be used to determine one party's undisclosed intent. Schering Corp v. Evanston Insurance Co. No. L-97311-88 (N.J. Super. Ct., Law Div., Union County, August 8, 1989).

Courts have not admitted extrinsic evidence when a policy provision admits of only one reasonable interpretation. Wolf v. Home Insurance Co. 100 N.J. Super. 27, 44 (App. Div. 1968), Kook v. American Surety Co. of N.Y. 88 N.J. Super. 43, 53 (App. Div. 1965) American Home Products Corp. v. Liberty Mutual Insurance Co. 748 F. 2nd 760, 765 (2d Cir. 1984). Moreover discovery of drafting history has been barred where the court found the history too tangential to the issue before it or too remote from the understanding of the parties to justify the burden of production. Air Products and Chemicals v. Hartford Accident and Indemnity No. L-17134-89 (N.J. Super. Ct., Law Div., Middlesex County, October 5, 1990); Schering Corp. v. Evanston No. L-97311-88 (N.J. Super. Ct., Law Div., Union County, August 8, 1989).

But where standard policy provisions have not been ruled upon and are submitted for interpretation, the weight of authority supports some limited production of drafting history. The Flintkote Co. v. Liberty Mutual Insurance Co. No. L-38115-88 (N.J. Super. Ct., Law Div., Bergen County, October 28, 1994); Primerica Holdings Inc. v. Employers Insurance of Wausau No. L-12342-90 (N.J. Super. Ct., Law Div., Middlesex County, November 9, 1993); Hestia Foods Corp. v. Aetna Cas. and Sur. Co. 135 FRD 101 (D.N.J. 1990); Lakai v. Federal Insurance Co. 129 FRD 99 (D.N.J. 1989); Insurance Co. of North America v. UNL Industries Inc. No. 92 CIV 4236 (KTD) (S.D.N.Y. December 6, 1994); Hartford Accident and Indemnity Co. v. Employers Insurance of Wausau No. 847212 (Calif. Super. Ct., December 17, 1992); Hoechst Celonese Corp. v. National Union Fire Insurance Co. 623 A 2nd 1099 (Del. Super. Ct. 1991); Borg - Warner Corp. v. Liberty Mutual Insurance Co. No. 88-539 (N.Y. Super. Ct., June 21, 1990); Fourth National Bank of Tulsa v. Federal Insurance Co. No. 90-C-171C (N.D. Okla. September 25, 1989); United States

Fidelity and Guarantee Co. v. Colorado National Band of Denver No. 86-Z-1033 (D. Colo. August 25, 1989); The above cases limited the drafting history to the specific insurance provisions in issue.

Other cases have imposed time restrictions, E.I. Du Pont di Nemours and Co. v. Admiral Insurance Co. No. 89C-AU-99 (Del. Super. Ct., March 4, 1993); or limited responses to primary carriers only Champion International Corp. v. Liberty Mutual Insurance Co. 129 FRD 63 (S.D.N.Y., 1989).

In Primerica Holding Inc. v. Wausau No. L-12342-90 (N.J. Super. Ct., Law Div., Middlesex County, November 9, 1993), Judge Harding ordered the defendants to produce drafting history of any pollution exclusion clause not utilizing the sudden and accidental terminology which was defined in Morton v. General Accident Insurance Co, 134 N.J. 1 (1993)

Plaintiff contends that the only policy language at issue in Primerica is the pollution exclusion clause. (Pb7) In the instant case, other policy provisions are invoked by defendants to deny coverage. Plaintiff refers me to the several sets of Answers filed by defendants. Thus, plaintiff seeks drafting history for several phrases and clauses, including the standard form pollution exclusion language.

I agree that additional policy language has been invoked by the defendants and that some drafting history is indicated. But the scope of that inquiry is not without bounds. Therefore, in accordance with the weight of authority, I recommend that any drafting history be confined to those standard form policy provisions, not defined in Morton but invoked by the defendants to deny coverage. Under these guidelines, the standard form pollution exclusion and the meaning of "damages" would not qualify for drafting history because these terms have been subject to court interpretation in Morton but the "owned property exclusion" would qualify. The Morton Court expressly declined to rule on the effect of that exclusion on the coverage issue because it wasn't raised, briefed or argued. Morton supra @ 27-28. Therefore, "key policy terms" should be confined to any term contained in a standard ISO provision which the responding defendants rely upon to deny coverage or upon which the defendant bases any of its affirmative defenses. The recommendations which follow apply to this definition.

The only remaining issue is the duty imposed on excess carriers. The excess policy may incorporate by reference the terminology employed by the primary carrier. If the excess carrier is relying on such a clause to defeat coverage, it may rely on the drafting history provided by the primary carrier or supply its own.

B. Statements to Insurance Regulatory Bodies -
Requests #6, 7, 33, 34, 41

As further clarification of disputed policy provisions, Pfizer seeks statements that defendants made to insurance regulatory bodies. In opposition defendant carriers contend the issue is moot because the standard pollution exclusion clause has been interpreted in Morton.

Pfizer offers to withdraw its request as to the pollution exclusion clause if defendants accept the Morton holding with respect to all of the sites in issue. (Prb8) Pfizer further maintains that there is policy language other than the pollution exclusion clause in issue.

Courts have permitted discovery of statements by insurers to regulatory bodies as an aid to interpretation of disputed policy language. Just v. Land Reclamation, Ltd. 456 N.W. 570, 575 (Wis. 1990); Nestle Foods Corp. v. Aetna Cas. and Sur. Co. No. 89-1701 (D.N.J., August 31, 1990); aff'd 135 FRD 101 (1990). But the scope of that discovery has been confined. Consistent with the limitations for drafting history, I recommend that such discovery be limited to defendants' statements referring to disputed policy language, not defined by Morton and relied on by the defendants to deny coverage.

C. Statements to Institutional Insurance Company Coverage Groups
Request #9

Plaintiff next seeks all correspondence and other communications between defendant insurers and representatives of ISO and other trade associations concerning coverage for environmental actions or delayed manifestation claims. Defendants oppose production of these documents as irrelevant and burdensome. I agree.

Plaintiff's reliance on Morton supra, on Leksi supra and on U.S. Gypsum v. Admiral Insurance Co. No. 83 L-53728 (Cir. Ct., Cook County, Ill., January 7, 1991) is misplaced. None of these cases address the precise issue here. Morton says that the insurance industry is bound by the representations of the Insurance Rating Board, its designated agent. Morton supra @ 75-76. Leksi held that an insurance company's participation or membership in a trade association is discoverable. Leksi 129 FRD 99, 104. In U.S. Gypsum a study generated by such insurance coverage groups was admissible as evidence, Id @6705-6706. There is no reference to discovery of communications between carriers and their trade associations.

Here plaintiff seeks statements made by each carrier to its trade associations since 1945. Any proposals the carriers may have made for specific policy language may or may not have found their way into the standard clauses, subject to interpretation here. The information sought is not useful for policy construction.

Therefore, I recommend that Request #9 be stricken.

D. Advertising, Promotional and other Marketing Materials.
Request #13

Plaintiff expects that these materials may aid in construction of policy language. Defendants agree to submit solely those materials distributed to plaintiff, in accordance with Judge Harding's limitation in Primerica supra.

But plaintiff argues that the purpose of the discovery is to ascertain the intent of the insurers, not merely the reliance that Pfizer placed on these materials. Thus broader discovery is necessary. In support of this pursuit, plaintiff notes that defendant Home's motion for summary judgement removing the count for misrepresentation, was granted without prejudice. Therefore, plaintiff argues, it can reassert its claim after obtaining discovery of such misrepresentation.

Even plaintiff's "inchoate" claim of misrepresentation doesn't appear to involve construction of the policy language or intent as to that construction. The burden of producing and examining a wide range of promotional literature is not justified for this purpose. Therefore, I recommend that Request #13 be limited to advertising materials distributed to plaintiff.

E. Manuals, Guidelines & Internal Operating Procedures
Requests #13, 16

Defendants contend that these marketing materials are irrelevant since the Pfizer policies were negotiated by insurance brokers. Pfizer disagrees, contending that the policy language in dispute is standard form policy language. Plaintiff is willing to accept the limitation imposed in Primerica, accepting the materials furnished to Pfizer or the insurance brokers. (Prb9)

There is ample support for the production of promotional materials as an aid in interpreting policy language. Primerica Champion International Corp v. Liberty Mutual Insurance 129 FRD 63 (S.D.N.Y. 1989); Allied-Signal Inc. v. Abutie-Palf Reassurances No. L-226-88, N.J. Super. Ct., Law Div., Morris County, November 3, 1989) slip. op. @ 30-31; Hoechst-Celanese Corp. v. National Union Fire Insurance Company No. 89C-SE-35 (Del. Super. Ct., New Castle County, October 10, 1991) slip. op. @ 21; Andover Newton Theological School, Inc. v. Continental Casualty Company 930 F. 2d 89, 94 (1st Cir. 1991); Freehold Cartage Inc. v. Lumberman's Mutual Casualty Company Nos. L-55313-88, L-52334-90, L-72558-81, L-56812-9 (N.J. Super. Ct., Law Div., Monmouth County, April 12, 1993).

Since plaintiff is willing to accept the Primerica supra limitations, Judge Harding's decision is controlling. I recommend that production be limited to those promotional materials and

brochures furnished to plaintiff and those manuals and internal operating procedures issued from the date of plaintiff's first policy to the present on the subjects of "underwriting", "coverage procedure", "existing claims procedures", to the extent these are available.

F. Other Policy Holders
Request #19

Plaintiff is seeking claims files of other policy holders who have made claims for insurance coverage growing out of environmental actions. Defendants argue that such files are irrelevant, burdensome to produce and confidential.

Plaintiff relies on Minnesota Mining and Manufacturing v. Commercial Union No. 88-325 (D.N.J., October 13, 1989) Order, page 4, in which the district court affirmed the magistrate's order for production of the ten earliest and ten latest claims files.

Defendants rely on various State Court decisions including Schering Corporation v. Evanston Insurance Company No. L-94311-88 (N.J. Super. Ct., Law Div., Union County; August 4, 1989) in which the request was categorically rejected and on Primerica in which Judge Harding denied the request as "collateral, idiosyncratic and not likely to lead to the discovery of admissible evidence for this trial."

Though plaintiff has agreed to limit its request, to accept affidavits in lieu of documents, the object of the exercise remains an effort to demonstrate inconsistency in the treatment of claims. Defendants would counter by trying to show differences between plaintiff's sites and those of other claimants, justifying disparate treatment, and thereby sidetracking the trial.

Judge Harding's decision in Primerica is controlling. Plaintiff has shown no reason to deviate from a denial of other claims files as collateral. I recommend that Request #19 be stricken as to other policyholders.

Plaintiff is relying on Request #19 to obtain information on other coverage litigation as well. The purpose of this request is to determine whether there is any inconsistency in defendants' coverage positions.

Plaintiff reasons that such an inconsistency could, if found, show bad faith thereby entitling plaintiff to prevail on a theory of estoppel. I don't have to deal with the tangential nature of this request or its burden. The problem here is that Request #19 does not ask for litigation files and I don't think it appropriate for me to reword that Request. Therefore, I would recommend that Request #19 be stricken in its entirety.

G. Reinsurance
Request # 37

Next plaintiff seeks all documents and status reports dealing with the purchase, placement or ceding of any reinsurance that relates to the Pfizer polices. Defendants contend that reinsurance information is irrelevant. In Primerica, Judge Harding denied reinsurance information but ordered the production of reinsurance policies. Plaintiff contends that the instant case differs from Primerica in that policy language other then the pollution exclusion clause is in issue.

Courts have permitted the insured to discover non-privileged communications between an insurance company and its reinsurers. Clark v. Interstate National Corp. 486 F. Supp. 145, 146 n.1 (E.D.P.A.), aff'd. 636 F. 2d 1207 (3rd Cir. 1980); Playtex v. Columbia Casualty Company No. 88C-MR-233-1-CU (Del. Super. Ct., New Castle County, October 12, 1988) slip. op. @ 2-3; Hechst supra, slip. op. @ 21-22.

In Aetna v. Ply-Gem No. L-5053-90 (N.J. Super. Ct., Law Div., Bergen County, April 22, 1993) Judge Longhi ordered non-privileged reinsurance information to be produced, stating that such information was relevant to "...policy interpretation, the risks that are involved, knowledge of the risks by the insured and the reinsurer, ambiguities, credibility, existence of admissions against interest." (T28)

Other courts have categorically rejected the production of such information. Leski v. Federal Insurance Company 129 FRD 99 (D.N.J. 1989); Schering Corp. v. Evanston Insurance Company supra. In Primerica, Judge Harding noted that reinsurance treaties are often ceded in advance of the issuance of policies and apply to groups of policies, rather than individual ones.

Although there are compelling reasons to preclude this discovery, I think that plaintiff should have the benefit of any information which is available to aid in policy interpretation. Defendants' communications with or status reports to its reinsurers may supply some helpful construction of disputed clauses. Production should be limited to non- privileged communications dealing with the Pfizer-policies in issue.

H. Loss Reserve Information
Requests #38, 39, 40

Plaintiff argues that the revelation of defendants' loss reserves data is relevant to show coverage. Since plaintiff is under a court order to provide estimates of its financial exposure on underlying claims, an evenhanded approach would require defendants to reveal the amount, the increase or decrease and the reasons for their loss reserves. But one has nothing to do with the

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other. Plaintiff's estimates of its financial exposure goes to damages. The loss reserve information is to be used for plaintiff's liability claim and it serves no purpose there.

In Primerica, Judge Harding denied the production of loss reserve information on the ground that such data doesn't reflect a true evaluation of the claim by the particular carrier. Moreover, these reserves are set in the aggregate, based on several variables including economic considerations and business risks.

Therefore, I recommend that Requests ¶38, 39 and 40 be stricken.

I. Defendants Knowledge of Potential Liabilities
Requests ¶23, 24, 25, 26

Plaintiff seeks loss control information to rebut defendants' alleged lack of knowledge and to rebut its defenses of late notice and misrepresentation. Plaintiff claims that loss control information was denied in Primerica because the questions were too generalized. In this instance, they are seeking particular information as to site investigation, studies conducted by the defendants.

Request ¶23 seeks site specific documents as to safety, loss control, loss prevention or engineering activities at the several sites. Request ¶24 seeks documents as to the use, handling or disposal of industrial or chemical wastes at the site. Request ¶25 and ¶26 seeks various guides and inspection check lists prepared or relied upon by the defendants. Defendants maintain that the requests are still too general. Further, they contend that the thrust of this case is not what the insurers knew, but what plaintiff knew or expected or intended.

I disagree that the defendants knowledge of environmental risks prior to contracting with plaintiff, is wholly irrelevant. In order to prevail on a late notice claim, defendant must show a breach of notice provision by plaintiff, that defendant is unaware of the site and that defendant is prejudiced by the breach. Cooper v. Government Employees Insurance Company 51 N.J. 86, 94 (1968). Plaintiff cannot rebut this claim without some discovery as to defendants prior knowledge.

The burden of producing this information can be overcome if production is restricted to site tests studies and investigations conducted prior to the issuance of any Pfizer policy or renewal thereof and such tests, studies or investigations were performed by, ordered by or relied upon by defendant insurers. With this limitation, I recommend that these Requests be granted.

Defendants Joint Motion to Compel

A. Corporate Knowledge
Interrogs ¶10, 15, 33, 39
Document Request ¶14

Plaintiff challenges those interrogatories seeking information as to corporate knowledge, contending that only Pfizer's subjective intentions and expectations regarding harm caused by its waste disposal activities are relevant. Defendants point out that the subjective standard set forth in Vorhees v. Preferred Mutual Insurance Company 128 N.J. 165 (1992) has been replaced by the case by case analysis set forth in Morton supra @ 86. In Morton, the Court found it impractical to adhere to the general rule of looking solely at the insured's subjective intent because proof of subjective intent to cause environmental harm will rarely be available. Therefore the Court held:

> ... we hold that in environmental coverage litigation a case by case analysis is required in order to determine whether, in the context of all the available evidence, "exceptional circumstances [exist] that objectively establish the insured's intent to injure." Vorhees 128 N.J. @ 185. Those circumstances include:
> 1. the duration of the discharges
> 2. whether the discharge occurred intentionally, negligently or innocently
> 3. the quality of the insured's knowledge concerning the harmful propensities of the pollutants
> 4. whether regulatory authorities attempted to discourage or prevent the insured's conduct
> 5. the existence of subjective knowledge concerning the possibility or likelihood of harm. Morton 134 N.J. @ 86.

The questions asked of plaintiff fall within these categories. Therefore, I recommend that adequate replies be given to ¶10, 15, 33, 39 and Document Request ¶14.

B. Use of Chemicals
¶16, 34, 35

Here, plaintiff urges that the information on Pfizer's use of chemicals is burdensome to produce. Pfizer uses some 10,000 chemical substances at its manufacturing facilities. Still other chemical substances are handled by its research facilities. Pfizer has 35 production facilities in the U.S. and major manufacturing facilities in 11 foreign countries.

Pfizer maintains that it has provided chemical information in its site summaries insofar as individual chemicals are specifically related to certain sites. In order to alleviate the burden, I recommend that ¶16, 34 and 35 be limited to those chemicals and

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INSURANCE

manufactured products which generated hazardous waste at the sites in issue.

Joyce Usiskin
Special Master

Date: March 31 1993

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MEALEY'S LITIGATION REPORTS
INSURANCE

TAB E

MEALEY'S LITIGATION REPORTS
INSURANCE

TIMROD RENTEX

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

DATE & TIME: November 5, 1992 DEPT. NO: 27
JUDGE : Hon. Ronald B. Robie CLERK : Peggy Allen
RECORDER : C.Washington BAILIFF : Rory Salvatierra

CV524615 TIMROD RENTEX CORP., ET AL VS. GUARANTEE INS. CO., ET AL

MOTION FILED BY: ONGERTH, RICHARD

ATTORNEYS PRESENT:

JOHN P. COLEMAN	ATTORNEY FOR DEFENDANT
FILLERUP, JEFFREY L.	ATTORNEY FOR DEFENDANT
ONGERTH, RICHARD H.	ATTORNEY FOR PLAINTIFF
GOETZ, RICHARD	ATTORNEY FOR DEFENDANT
IWASAKI, BRUCE	ATTORNEY FOR DEFENDANT

NATURE OF PROCEEDING: MOT TO COMPEL,ETC;AMD MOT TO COMP

TENTATIVE RULING

Motion to compel production as to Guarantee, INA and St. Paul:

15: Granted, subject to presentation to the court for in camera review.

16: Denied. This is too broad. The court declines to narrow it.

17: Granted.

18: Denied. See ruling on 16.

23: Granted, however, this is limited to defenses provided when lawsuits have been filed, or when defenses were provided for administrative proceedings. Also, the request is limited to documents in which defendant states it will or will not provide a defense or discusses the provision of a defense.

24: Granted, however limited to 1) documents showing payments on claims about which lawsuits have been filed or administrative proceedings have been initiated, or, 2) documents showing payment for indemnity not falling under 1) above with names redacted.

The court notes that as to #23, 24 and 26 if one document includes the information requested, mulitiple documents on the subject need not be provided. The obtaining of information about other claims paid, for example, could have been initiated by interrogatory followed by document production. However, the objective can be obtained by narrowing the requests as stated above.

26: Granted, but limited to the minimum number of documents and subject to the limitations stated in #24.

27: Denied. In view of the fact that the preliminary inquires above have not been responded to, this is really an interrogatory or the subject of deposition testimony in the form of a document request and is not proper. If it appears plaintiff was treated differently than others, an appropriate inquiry can be made thereafter.

Request as to St. Paul only:

11: Denied. This is overbroad.

MEALEY'S LITIGATION REPORTS
INSURANCE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

DATE & TIME: November 5, 1992 DEPT. NO: 27
JUDGE : Hon. Ronald B. Robie CLERK : Peggy Allen
RECORDER : C.Washington BAILIFF : Rory Salvatierra

CV524615 TIMROD RENTEX CORP., ET AL VS. GUARANTEE INS. CO.; ET AL

MOTION FILED BY: ONGERTH, RICHARD

Requests as to INA only:

9: Granted, subject to a protective order that the materials may not b used outside this lawsuit, and limited to documents relating to the processing of claim of the type which are the subject of this litigation.

10: Granted. See ruling on 9.

10 days to comply.

Sanctions: Denied.

COURT RULING

This matter argued by counsel and submitted.

After hearing oral arguments, the Court affirmed his ruling with the following modifications:

As to #17: Granted with limitations to reserve documents that were prior to the bad faith ligitation which was fully stated into the record.

As to #23,24, and #26: Limited for one (1) year.

The 10 days to comply is deferred until Judge Warren makes a ruling o the motion to bifurcate which was fully stated into the record.

The Court also took under submission the issue as to INA.

BOOK: DEPT 27
PAGE: 56
DATE: November 5, 1992
CASE NO: CV524615
CASE TITLE: TIMROD RENTEX CORP., ET AL VS. GUARANTEE INS. CO., ET AL
DISTRIB:

SACRAMENTO SUPERIOR COURT
BY: P. Allen DEPUTY

MEALEY'S LITIGATION REPORTS
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

DATE & TIME: November 5, 1992 | DEPT. NO.: 27
JUDGE : RONALD B.ROBIE | CLERK : P. ALLEN
REPORTER : NCR | BAILIFF : R. SALVATIERRA

TIMROD RENTEX CORP. et al., | Richard H. Ongerth

VS. CV524615 | John P. Coleman / Jeffrey L. Fillerup
Bruce Iwasaki / Richard Goetz

GUARANTEE INSUARANCE CO., et al.,

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The court, having taken plaintiff's motion to compel further responses to production of documents by defendant INA, under submission, now rules as follows:

The issue taken under submission was whether the motion should be denied as not timely filed. There is no writing in the record as required by the statute. Counsel for defendant argues that a one week extension given one day before the deadline (September 15), extends the deadline one week from that date rather than one week from the deadline. Although this interpretation makes no sense and the extension should be to September 22, the motion to compel was not filed until September 23. Counsel for plaintiff argues various equitable theories by which the failure to have a writing does not bar this motion. The Legislature required an agreement in writing for the very reasons exemplified by this dispute. There is no agreement in writing and the motion was not timely filed. See Weil & Brown, *California Practice Guide, Civil Procedure Before Trial*, §8:1491 et. seq.

Denied.

November 5, 1992

Ronald B. Roble, Judge of the Superior Court.

CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of this document was mailed, first class, postage prepaid, in a sealed envelope addressed as shown below and that the said document was mailed and this certificate was issued at Sacramento, California on: November 6, 1992

CONTINUED ON PAGE 2 FOR MAILING LIST

BOOK: 27
PAGE: 76
DATE: 11/5/92
CASE NO.: CV524615
CASE TITLE: TIMROD RENTEX/GUARANTEE INS.
DISTRIB:

CCla,,150 (Rev.8-6-90)

SACRAMENTO SUPERIOR COURT
BY: P. Allen
Deputy Clerk
P. ALLEN

TAB F

REECE AND APPEL
A Professional Law Corporation
1746 Grand Canal Blvd., #11
Stockton, CA 95207-8111
Telephone: (209) 477-8107
mj

DISCOVERY REFEREE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

LINCOLN PROPERTIES, LTD., a California Limited Partnership, Plaintiff, vs. CIGNA INSURANCE COMPANY; THE CONNECTICUT INDEMNITY COMPANY; CRUM & FORSTER CORPORATION; FIREMAN'S FUND INSURANCE COMPANY; INDUSTRIAL INDEMNITY COMPANY; INSURANCE COMPANY OF THE WEST; INSURANCE COMPANY OF NORTH AMERICA; LUMBERMEN'S MUTUAL CASUALTY COMPANY; STATE FARM FIRE AND CASUALTY COMPANY; SUPERIOR NATIONAL INSURANCE COMPANY; and DOES 1 through 100, inclusive, Defendants. AND RELATED CROSS-ACTION.	NO. 239274 ORDER GRANTING LINCOLN PROPERTIES, LTD.'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM STATE FARM FIRE AND CASUALTY COMPANY

The motion of plaintiff and cross-defendant Lincoln Properties, Ltd. ("Lincoln") against defendant and cross-defendant State Farm Fire and Casualty Company ("State Farm") for an order compelling further production of documents, identified below, was heard by John H. Reece, Esq., sitting as discovery referee, on November 2, 1992. State Farm and Lincoln appeared by and through their respective counsel of record.

Lincoln's motion sought to compel further production of documents in response to its First Set of Document Requests, served by Lincoln on January 14, 1992. Lincoln's motion to compel requested production of documents in the following four categories: Drafting History, Claims Handling Documents, Advertising and Promotional Materials and Environmental Claims Files.

After full consideration of the evidence and points and authorities submitted by both parties and oral argument of counsel, the Discovery Referee orders as follows:

1. Drafting History:

After making a diligent search and reasonable inquiry as required by Code of Civil Procedure § 2031, State Farm shall produce all documents in its possession, custody or control that relate to the drafting of any language in the Comprehensive General Liability ("CGL") portion of the State Farm policy issued to Lincoln upon which State Farm relies to deny or dispute coverage, including that policy language referred to in its Second, Fourth, and Seventh Affirmative Defenses herein and its reservation of right letters pertaining to Lincoln's claim (hereinafter, "the Disputed CGL Policy Language").

2. Claims Handling Documents: After making a diligent search and reasonable inquiry as required by Code of Civil Procedure § 2031, State Farm shall produce all documents in its

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possession, custody or control that relate to the interpretation and application of the Disputed CGL Policy Language, as that language has been applied to environmental claims between 1970 through 1992. Such documents shall include, without limitation, claims manuals, indices of documents related to environmental claims handling procedures, memoranda concerning environmental claims handling practices or procedures, instructional guides and other training materials for environmental claims personnel, operation guides for persons dealing with environmental claims and any drafts or revisions of such documents.

It appears that, under the law, plaintiff is entitled to documents that relate to interpretaion and application of the policy langunge in dispute. While the above order for production may be very broad, there has been an insufficient showing of burden upon State Farm to warrant a limitation on production.

3. Advertising and Promotional Material: After making a diligent search and reasonable inquiry as required by Code of Civil Procedure § 2031, State Farm shall produce all documents in its possession, custody or control that relate to promotion and advertisement of CGL policies similar to the policy issued to Norge Cleaners and Lincoln and that relate to coverage for claims arising from environmental contamination.

Limitation of production to documents from State Farm's home office does not appear to be a reasonable or necessary limitation.

4. Third Party Claims Files: After making a diligent search and reasonable inquiry as required by Code of Civil

Procedure § 2031, State Farm shall produce its ten earliest and ten most recent environmental claims files, and its claims file for Norge Cleaners pertaining to the Lincoln Center Contamination. State Farm shall redact from these files all information which identifies the insureds by name, address or telephone number and shall also redact information reflecting the insureds' personal finances, in order to protect the insureds' privacy rights. The redacted portions shall be designated as such on the copies produced to Lincoln. These redacted third party claims files shall be used only for purposes of this litigation and shall otherwise be held in confidence by Lincoln.

The referee understands that State Farm agrees that Colonial Life requires production of third party files. Owens-Brockway supports Lincoln's position that the limited production request (ten earliest and ten most recent) is reasonable. While Colonial Life involved a court order that required a letter be sent to the third party claimants requesting consent to release records, it is not clear that the applicability of Insurance Code § 791.13 was in issue. (The focus of the dispute seemed to be plaintiff attorneys' right of access to other third party claimants.)

This referee does not believe that § 791.13 requires consent of the third party insureds in the context of the facts of this case. Two exceptions seem to apply, subdivision (g) and (h). Prior consent is not required if the production is in response

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to a facially valid judicial order, including a subpoena. (Subdivision (g).) Plaintiff's request for an order for production would seem to fall within that exception. Subdivision (g), urged as pertinent by plaintiff, exempts production of records as "otherwise permitted or required by law." That also appears to have applicability.

The § 791.13 non-disclosure rule is subject to a broad array of express statutory exceptions, eighteen in number. Many of the exceptions appear to serve purposes no more important than the purposes of disclosure in this lawsuit. And, when disclosure is allowed under the statutory exceptions, no "redaction" is required--only an agreement not to disclose the contents of the records. By comparison, this order for production requires redaction of identifying information and personal finance information, and requires confidentiality.

Limitation to production of files concerning incidents in Northern California or California does not seem to be a reasonable or necessary limitation.

It would appear that the Norge file is potentially directly relevant to some of the issues in this case. State Farm may claim attorney/client and or work product exemptions, as appropriate, and may redact substantive information of such nature, from copies of legal bills.

5. Time For Further Production: Due to the date of this Order State Farm shall produce the documents to Lincoln as ordered herein on or before January 15, 1993.

6. Sanctions: Sanctions will not be ordered in this instance. Good Faith meet and confer appears to have been lacking on both sides. "Offsetting penalties" will not be ordered. The referee will devote closer scrutiny to the subject of sanctions in regard to future issues.

DATED: 12/3/92

John H. Rebch
JOHN H. REBCH
Discovery Referee

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TAB G

MISSOURI PACIFIC RAILROAD COMPANY

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

MISSOURI PACIFIC RAILROAD COMPANY,)
)
Plaintiff,)
)
vs.) CASE NO. 93 L 712
)
CERTAIN UNDERWRITERS AT LLOYD'S,)
LONDON, et al.,)
)
Defendants.)

ORDER

This cause is before the Court on Plaintiff's Motion to Compel Answers to Interrogatories and Production of Documents filed on July 11, 1994 ("Plaintiff's Motion"). A hearing on Plaintiff's Motion was held on September 19, 1994. A conference on Plaintiff's Motion, with Plaintiff's Counsel and Defendants' Liaison Counsel in attendance, was held on January 18, 1995.

Upon consideration of Plaintiff's Motion, the Defendants' opposition thereto and the entire record herein, it is hereby ORDERED that Plaintiff's Motion is granted in part and denied in part. Except as otherwise directed in this Order, each defendant shall provide discovery to Plaintiff as directed below within thirty (30) days of the entry of this Order, or March 31, 1995, whichever is later.

I. ORGANIZATIONAL CHARTS AND CORPORATE AFFILIATIONS

A. Each defendant is directed to produce all organizational charts relating to the responding defendant's underwriting department, division, or unit responsible for underwriting the responding defendant's policies at issue in this action. Each defendant's obligation shall be limited to the production of all responsive documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or three years prior to the inception date of the responding defendant's first policy at issue in this action through the inception date of the responding defendant's last policy at issue in this action.

B. Each defendant is directed to produce organizational charts relating to the responding defendant's claims department, division, or unit responsible for handling the coverage claims at issue in this action. Each defendant's obligation shall be limited to the production of all responsive documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or the date that the responding defendant received Plaintiff's first notice of the underlying claims at issue in this action until the commencement of this action.

C. Each defendant is directed to produce documents sufficient to describe the responding defendant's corporate structure. Each defendant's obligation under this Section I (C) of this Order shall be limited to the production of documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or three years prior to the inception date of the responding defendant's first policy at issue in this action through the inception date of the responding defendant's last policy at issue in this action.

II. AFFIRMATIVE DEFENSES

Each defendant is directed to provide Plaintiff with the factual basis for its affirmative defenses. Defendants shall provide Plaintiff with this information by March 31, 1995 or thirty (30) days from the entry of this Order, whichever is later.

III. NEGOTIATION AND PREPARATION OF MISSOURI PACIFIC AND CERI POLICIES; DRAFTING HISTORY AND INTERPRETIVE DOCUMENTS

A. Negotiation and Preparation of Missouri Pacific and CERI Policies

(1) Each defendant is to identify each person who was involved in the issuance of each of the responding defendant's liability policies at issue in this action, including each person involved in any discussions or communications with Plaintiff, any other insurer, or any insurance broker.

(2) Each defendant is directed to identify each person who was involved with the evaluation or assessment of the risks being assumed by the responding defendant under each of the responding defendant's liability insurance policies at issue in this action.

(3) Each defendant is directed to produce all documents used or referred to by defendant in the negotiation, drafting, derivation, preparation, underwriting, acceptance, issuance, or interpretation of the terms, conditions and exclusions of the responding defendant's policies at issue in this action and in the assessment of risks in connection with the issuance of such policies.

(4) Each defendant's obligation under Section III (A) of this Order shall be limited to the production of all responsive documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or three years prior to the inception date of the responding defendant's first policy at issue in this action through the termination date of the responding defendant's last policy at issue in this action.

B. Drafting history and Interpretive Documents

(1) Each defendant is directed to produce all documents in the possession, custody or control of the responding defendant, no matter where located, regarding the creation, drafting, derivation, preparation, underwriting, acceptance, issuance, interpretation or application of the pollution exclusion, definition of accident or occurrence, definition of property damage, notice of claim condition, following form provision, definition of personal injury or insuring agreement relating to coverage for property damage or personal injury contained in, attached to, or incorporated by reference in any of the responding defendant's liability policies at issue in this action.

(2) Each defendant is directed to identify each past or present employee of the responding defendant who was involved with the drafting derivation, preparation, underwriting, acceptance or issuance of any printed, standard, or form insurance policy or insurance policy provisions referenced in Section III B(1) of this Order and which are contained in,

attached to, or incorporated by reference in any of the responding defendant's liability policies at issue in this action.

(3) Each defendant is directed to identify each person who was involved with the drafting, creation or modification of any "Legal and Adjustment Expense" provision contained or incorporated in any of the responding defendant's liability policies at issue in this action.

(4) Each defendant is directed to produce all documents relating to the responding defendant's decision to include or not include a "pollution exclusion" in any of the responding defendant's liability insurance policies at issue in this action.

(5) Each defendant is directed to produce all documents relating to the responding defendant's decision to include a "Legal and Adjustment Expense" provision in any of the responding defendant's liability insurance policies at issue in this action.

(6) Each defendant's obligation under Section III (B) of this Order shall be limited to the production of all responsive documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or three years prior to the inception date of the responding defendant's first policy at issue in this action through the termination date of the responding defendant's last policy at issue in this action.

IV. INFORMATION RELATING TO CLAIMS HANDLING, INCLUDING DENIAL OF COVERAGE, DATE OF LOSS AND LOSS RESERVES

A. Claims Handling - Each defendant is directed to:

(1) Identify each person who was involved in any manner for or on behalf of the responding defendant with reviewing, administering, processing, handling, analyzing, evaluating and adjusting Plaintiff's insurance claim relating to the sites at issue in this action.

(2) Produce all claims manuals and similar materials used by responding defendant for the handling of the insurance claims at issue in this action. Each defendant's obligations shall be limited to the production of all responsive documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or the date the responding defendant received Plaintiff's first notice of the underlying claims at issue in this action until the commencement of this action.

B. Date of Loss - Each defendant is directed to:

(1) State whether responding defendant has assigned a date of loss to Plaintiff's insurance claims at issue in this action. If a date of loss has been assigned, identify the date of loss assigned, the criteria used in assigning such date of loss, and all persons involved in assigning such date of loss. If no date of loss has been assigned, identify the criteria used in deciding not to assign a date of loss, and all persons involved in any manner in the decision not to assign a date of loss.

(2) Produce all documents relating to the responding defendant's assignment of a date of loss, or decision not to assign a date of loss, to Plaintiff's claim for insurance coverage relating to the sites at issue in this action.

C. Loss Reserves - To the extent Plaintiff's motion seeks the production of documents or information concerning the establishment, adjustment or maintenance of reserves or loss reserves or relating to each defendant's decision not to establish, adjust or maintain a reserve or loss reserve for Plaintiff's claim for insurance coverage relating to the sites at issue in this action, Plaintiff's Motion is denied.

D. Denial of Coverage

(1) Each defendant is directed to provide whether it has denied coverage for Plaintiff's insurance claim relating to the sites at issue in this action.

(2) If the responding defendant has denied coverage, the responding defendant shall provide the date on which such denial was communicated to Plaintiff, the method of such communication, and the identity of the persons involved in the decision to deny coverage.

(3) If the responding defendant has not denied coverage, the responding defendant shall provide its coverage position, the date on which such position was communicated to Plaintiff, the method of such communication, and the identity of the persons involved in determining or establishing the responding defendant's coverage position.

V. MARKETING AND PROMOTIONAL MATERIALS; FILINGS WITH STATE OR FEDERAL AGENCIES

A. Marketing and Promotional Materials

(1) Each defendant is directed to produce all marketing, promotional or advertising materials relating to the types of policies issued to plaintiff by the responding defendant which mention or refer to insurance coverage or lack of insurance coverage for liability relating to pollution or environmental damage.

(2) Each defendant's obligation under Section V (A) of this Order shall be limited to the production of all responsive documents in the possession, custody or control of the responding defendant which were created during the period from the later of 1950 or three years prior to the inception date of the responding defendant's first policy at issue in this action through the termination date of the responding defendant's last policy at issue in this action.

B. Filings with State or Federal Agencies

(1) Each defendant is directed to produce all documents filed with any federal or state agency relating to any "pollution exclusion" upon which the responding defendant relies in this action. In the event the responding defendant does not have such documents or copies thereof in its possession, the responding defendant shall produce such documents it has in its possession that sufficiently identify such responsive documents filed with any state or federal agency and provide releases to the extent necessary for Plaintiff to obtain copies of any such responsive documents form the state or federal agencies.

(2) Each defendant's obligation under Section V (B) of this Order shall be limited to the production of responsive documents filed with a federal or state agency during the period from the later of 1950 or the inception date of the responding defendant's first policy at issue in this action through the termination date of the responding defendant's last policy at issue in this action.

VI. OTHER INSUREDS' SITE SPECIFIC CLAIM INFORMATION

A. Each defendant shall identify each person other than Plaintiff who has made a claim against that responding defendant for insurance coverage for the sites at issue in this action.

B. Each defendant shall produce all documents consisting of, contained in or relating to the responding defendant's claim files for any insurance claim by any person other than Plaintiff concerning the sites at issue in this action.

C. Each defendant shall be permitted to redact proprietary and confidential information, including but not limited to the identity of its other insureds, policy limits, premium calculation, attachment points, reserves, rating, pricing, reinsurance and settlement negotiation information contained in the documents required to be produced pursuant to Section VI of this Order.

D. Each defendant shall provide to Plaintiff a declaration by that defendant's lead counsel or a person

directly under the control of the lead counsel stating that the declarant has reviewed personally the redacted information and that the redactions conform to the specifically enumerated categories of proprietary and confidential information. In the event that other information is redacted as proprietary and confidential, each such category of information shall be specifically identified in the declaration, subject to further consideration by this Court, if necessary.

VII. REINSURANCE INFORMATION

A. Each defendant shall produce or identify all communications to or from its reinsurers relating to the environmental risk coverage under plaintiff's policies, as well as plaintiff's environmental claims at issue in this case, made before the termination date of the most recent policy issued by that defendant.

B. Each defendant shall be permitted to redact the identity of its reinsurers, premium calculations and information relating to rating, pricing and reserves.

C. Each defendant shall provide to Plaintiff a declaration by that defendant's lead counsel or a person directly under the control of the lead counsel stating that the

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declarant has reviewed personally the redacted information and that the redactions comply with the requirements of this Order.

ENTERED:

Dated: _____

Honorable Robert J. Hillebrand

RJCSO161.ORD

MEALEY'S LITIGATION REPORTS INSURANCE

MEALEY PUBLICATIONS INC, WAYNE PA

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VOL. 9, #20, 3/28/95

TAB H

Sunbeam Corporation, et al. v. Liberty Mutual Insurance Company, et al.

Equity Action—Contract Action—Regulatory Estoppel Doctrine—Environmental Pollution

1. An equity action will not be allowed to proceed if plaintiff has a full, complete and adequate remedy at law.

2. Disputes as to a defendant's rights and obligations under a contract must be raised in a breach of contract action or through declaratory relief, they may not be raised in an equity action.

3. A regulatory estoppel doctrine claim may be raised in a contract action.

4. While an equity action may be available under some circumstances of fraud, it (an equity action) is never available where an action of law will provide a full, complete and adequate remedy and when an equity action will not do so.

(M. Elizabeth Williams)

Andrew M. Roman for the Plaintiffs.
Steven G. Adams and *Walter M. Einhorn, Jr.* for First State Insurance Co.
Larry A. Silverman, Michael J. Cohen and *Kenneth Iwinski* for Penna. Manufacturers Assoc.
Raymond Conlon and *Frances T. Norek* for Lexington Insurance Co.
Joseph G. Manta and *Thomas B. O'Brien* for Liberty Mutual Insurance Co.
No. GD 95-13947. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., July 17, 1996—This is an equity action which involves insurance coverage for environmental pollution. Defendants' preliminary objections seeking dismissal of plaintiffs' claims for equitable relief are the subject of this Opinion and Order of Court. I will describe the factual background of the controversy before I address the issues raised by defendants' preliminary objections.

Plaintiffs are successors in interest, through bankruptcy reorganization, to the assets and discharged liabilities of Allegheny International, Inc., and certain of its subsidiaries. Defendants are insurance companies who issued comprehensive general liability insurance policies ("CGL Policies") to Allegheny International or its predecessors in Pennsylvania in the 1970s and 1980s.

Plaintiffs' Proposed Amended Complaint in Equity ("complaint")[1] identifies ten sites where one or more of plaintiffs may be liable for cleanup and remediation expenses resulting from actual or threatened environmental contamination or pollution. The complaint alleges that plaintiffs or their predecessors have already spent in excess of $29 million as a result of claims involving the ten sites and anticipate that they will spend substantial additional sums in the future.

Plaintiffs have requested defendants to provide coverage for claims involving environmental contamination and pollution at the ten sites under dozens of primary and excess CGL Policies issued by defendants. Defendants have denied coverage.

The insurance policies which defendants issued to plaintiffs are standard policies developed and utilized by the insurance industry. The standard CGL policy provides coverage for damages arising out of an "occurrence" which is defined as

---

[1] This Opinion considers the allegations in plaintiffs' Proposed Amended Complaint in Equity which is attached as Exhibit A to Plaintiffs' Brief in Opposition to Defendants' Amended Preliminary Objections.

> an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured.

This standard CGL policy contains a pollution exclusion clause which states that the insurance does not apply

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.* (Emphasis added.)

The environmental liabilities for which plaintiffs seek coverage occurred from repeated exposure to the discharge of waste materials which, while not expected to cause damage, did so over time. Defendants contend that the pollution exclusion precludes coverage for all pollution damage unless the discharge of waste materials resulted from an abrupt and abbreviated accident.

Pennsylvania case law supports defendants. The Pennsylvania Superior Court has consistently ruled that this standard pollution exclusion bars coverage for "any unintentional release or dispersal of pollution that occurs gradually over time"; there is coverage only where a discharge is "both sudden, meaning abrupt and lasting only a short time, and accidental, meaning unexpected." *O'Brien Energy Systems, Inc. v. American Employers' Insurance Company,* 629 A.2d 957, 962 (Pa.Super. 1993), quoting, *Lower Paxton Township v. United States Fidelity and Guaranty Co.,* 557 A.2d 393, 398 (Pa.Super. 1989), appeal denied, 523 Pa. 649, 567 A.2d 653 (1989); *Techalloy Co. v. Reliance Insurance Co.*, 487 A.2d 820 (Pa.Super. 1984), allocatur denied (Pa. 1985).

The opinion of Honorable Phyllis W. Beck in *Lower Paxton Township v. United States Fidelity and Guaranty Co., supra,* is the most comprehensive. The insurance policy in that case contained the standard pollution exclusion and the insured sought insurance coverage for damages caused by the gradual, repeated release of pollutants. Judge Beck applied the general principle of insurance law that if a policy term is susceptible to two interpretations or subject to reasonable question, it should be construed in favor of the insured. Thus, the controlling issue was whether the pollution exclusion clause is ambiguous.

The insured argued that this exclusion may be reasonably construed to exclude coverage only in cases of intentional pollution—i.e., where the pollution is either expected or intended by the insured. The insurance company, on the other hand, argued that there was no ambiguity—the plain meaning of "sudden and accidental" imposes a double requirement: the discharge must be both non-gradual and unexpected. The insured contended that this language on which the insurance company relied was not as clear as the insurance company suggested. The term "sudden" is not defined in the policy and the word itself has no clear plain meaning. Furthermore, since the policy provides coverage for an occurrence which includes continuous and repeated exposure to conditions which result in bodily injury or property damage, the coverage provision is misleading unless the pollution exclusion is construed in a narrower fashion.

The Superior Court rejected these arguments of the insured. Judge Beck stated that the juxtaposition of the occurrence provision and the pollution exclusion does not create any confusion. The policy provides coverage for continuous or repeated exposure to conditions causing damages in all cases, except those involving pollution where coverage for damages caused by a pollutant is limited to a discharge that is sudden and accidental. The Court also concluded that the everyday meaning of "sudden" contains a temporal element. The Court's opinion stated that:

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> This additional element is the temporal meaning of sudden, i.e. abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage. *Lower Paxton Township v. United States Fidelity and Guaranty Co.*, 557 A.2d at 402 (citation omitted and footnote omitted).

As a result of the *Lower Paxton Township* line of cases, plaintiffs have what would appear to be an insurmountable problem with obtaining insurance coverage for their losses in this court. The defendant-insurance companies' only obligations to plaintiffs arise out of their insurance contracts; plaintiffs have no legal claims that they may pursue against these companies other than the contractual obligations in these insurance policies. Under the polices, the insurance companies are obligated to provide coverage for an occurrence which is defined as an accident, including continuous or repeated exposure to conditions that result in bodily injury or property damage neither expected nor intended from the standpoint of the insured. However, the same policies contain the pollution exclusion which, according to settled Pennsylvania appellate court case law, bars the pollution-related damages for which plaintiffs seek coverage. Thus, unless in subsequent opinions the Pennsylvania appellate courts reject the *Lower Paxton Township* line of cases, plaintiffs will not prevail in any lawsuit filed in the Pennsylvania courts based on defendants' insurance policies so long as the insurance companies raise the argument that the pollution exclusion does not cover releases or dispersals of pollution that occur gradually.

In this equity action, plaintiffs request this court to enjoin defendants from asserting that the standard pollution exclusion clause excludes any unintentional release or dispersal of pollution in response to any claims submitted by plaintiffs under any of defendants' insurance policies covering the ten locations described in plaintiffs' complaint. In other words, whether the pollution discharge was gradual or non-gradual would be irrelevant. The court order which plaintiffs seek would allow the insurance companies to utilize the pollution exclusion only in cases of intentional pollution; in any lawsuit filed in any jurisdiction involving these sites defendants would not be permitted to claim that their policies excluded the damages for which plaintiffs seek coverage unless the insurance companies can establish that these damages were expected or intended.

If plaintiffs are successful in this lawsuit, they can prevail in contract actions based on defendants' policies without challenging the case law in Pennsylvania and other jurisdictions which holds that the pollution exclusion should be construed to exclude coverage for damages resulting from gradual and repeated exposure to pollutants. While plaintiffs recognize that the relief which they seek is extraordinary, plaintiffs contend that this request arises out of an extraordinary situation, namely the factual background described in plaintiffs' complaint that led to the inclusion of the pollution exclusion in the standard CGL insurance policy.

According to plaintiffs' complaint, prior to 1966 the standard CGL policy covered liability "caused by accident." The term "accident" was undefined, leading some courts to interpret it as being limited to temporally sudden, unexpected, and identified events and other courts to interpret it as applying also to unintended and unexpected injuries or damages that resulted from gradual processes. The insurance industry responded to the uncertainty by establishing a task force to draft what eventually became the 1966 CGL policy language. The 1966 CGL policies substituted an "occurrence" approach for the "accident" approach; this new approach afforded coverage based on an occurrence which the CGL policy defined as an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured. (See this Opinion at 2, *supra*.) The purpose of the 1966 language was to cover gradual damage or injury arising out of environmental hazards.

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Approximately four years later, foreseeing pending increases in claims for environmentally related losses, the insurance industry drafted the qualified pollution exclusion that is the subject of this litigation, namely the pollution exclusion that excludes any bodily injury or property damage caused by pollution other than a discharge, dispersal, release, or escape that is "sudden and accidental."

Plaintiffs' complaint alleges that the insurance industry intended for this exclusion to be a mandatory addition to the standard CGL policy. In order to accomplish this result, the insurance industry was required to obtain the approval of the insurance regulatory authorities of the various states for the addition of this exclusion to the standard CGL policy. This required the insurance industry to explain the purpose and intended effect of the exclusion. The insurance industry submitted the same explanatory memorandum to each of the regulatory authorities. This memorandum included the following statement:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The [proposed] exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident. Complaint at ¶38.

Plaintiffs aver that the insurance industry described the purpose of the exclusion in this fashion in order to persuade state regulatory insurance agencies to approve the addition of the exclusion to the standard CGL policy with no reduction in premium and no change in the wording of the proposed exclusion.[2]

In May 1970, the insurance industry sought approval by the Pennsylvania Insurance Department of the qualified pollution exclusion pursuant to regulations of the Pennsylvania Insurance Department which require that any changes in policy forms or endorsements be approved by the Insurance Department. In connection with the submission of the proposed exclusion, the insurance industry submitted to the Insurance Department the explanation of the purpose and effect of the proposed exclusion that is quoted above. Plaintiffs allege that the industry represented that the proposed exclusion was merely a clarification of existing coverage, that no cutback in coverage was intended, and that coverage would continue for pollution claims caused by an "accident" which in Pennsylvania included long-term effects of gradual pollution so long as the damage was not expected or intended.

Plaintiffs' complaint also contains the following allegations: The Pennsylvania Insurance Department relied on these representations and understood that the proposed exclusion was only a clarification of existing coverage which would not result in a substantial reduction in coverage. Had the Insurance Department, prior to its approval of the exclusion, been told or understood that the proposed exclusion involved a major change or limitation of coverage, the Actuarial Division of the Pennsylvania Insurance Department would have reviewed the exclusion to evaluate the necessity of a premium change and determine whether a rate reduction would be warranted. Relying on the information and explanations provided by the insurance industry, the Pennsylvania Insurance Department approved the use of the standard pollution exclusion in Pennsylvania effective November 11, 1970.

Plaintiffs state that the position that defendant-insurance companies now assert that the pollution exclusion approved in 1970 effected a substantial change in coverage by ex-

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[2] The description in plaintiffs' complaint of the history of the standard pollution exclusion clause is almost identical to the New Jersey Supreme Court's description in *Morton International, Inc. v. General Accident Insurance Co. of America*, 629 A.2d 831, 847-855 (N.J. 1993); also see *Joy Technologies, Inc. v Liberty Mutual Insurance Company*, 421 S.E. 2d 493 (W. Va. 1992).

cluding pollution damage unless the discharge was "sudden" (meaning abrupt and lasting for a limited duration) is directly contrary to the meaning and effect which defendants, through their authorized agents, set forth in their official communications with the various state insurance regulatory agencies. Defendants, through their agents, perpetrated a fraud on the Commonwealth of Pennsylvania and its citizens. Plaintiffs contend that this court, as a matter of equity and of public policy, should not permit defendants to benefit from their fraudulent conduct.

In their preliminary objections, defendants contend that (1) plaintiffs have a full, complete, and adequate remedy at law, namely breach of contract suits based on the insurance policies which defendants issued (Pa.R.C.P. No. 1509(c)) and (2) plaintiffs' complaint should be dismissed for failure to state claims upon which relief can be granted (Pa.R.C.P. No. 1028(a)(4)).

I.

In their complaint, plaintiffs may be claiming that defendants' insurance policies cannot be properly construed without considering the entire factual background of the development and approval of the pollution exclusion. If a court construes the post-1970 CGL policy simply by looking at the language of the pollution exclusion, the court may conclude that the exclusion clearly and unambiguously excludes unintentional releases or dispersals of pollution that occurred gradually over time. But, if a court also considers the regulatory history set forth in plaintiffs' complaint, a court should conclude that there is ambiguity concerning the scope of the exclusion in which case the policy will be construed in favor of plaintiffs.

However, this is an argument that may be raised in a breach of contract claim against defendant insurance companies.[3] In a contract action in appropriate situations, extrinsic evidence can be introduced to show a latent ambiguity. *Samuel Rappaport Family Partnership v. Meridian Bank,* 657 A.2d 17, 22 (Pa.Super. 1995); *Z&L Lumber Co. of Atlasburg v. Nordquist,* 502 A.2d 697, 700 (Pa.Super. 1985); *Kohn v. Kohn,* 364 A.2d 350, 354 (Pa.Super. 1976). If plaintiffs are contending that defendants should be barred from claiming that the insurance agreements clearly and unambiguously bar coverage for releases or dispersals of pollution that occurred gradually over time because the 1966-1970 regulatory history supports plaintiffs' interpretation of the insurance agreement, plaintiffs are simply asking this court to rule as a matter of contract law that the insurance agreements are ambiguous and, consequently, must be construed in plaintiffs' favor. Disputes as to a defendant's rights and obligations under a contract must be raised in a breach of contract action or through declaratory relief; they may not be raised in an equity action.

II.

Plaintiffs may be claiming that the actions of the insurance industry during 1966 to 1970 described in plaintiffs' complaint caused plaintiffs' predecessors to believe that there was coverage for any damages attributable to pollution that was neither expected nor intended by the insured. The claim is that the insurance industry indirectly advised CGL policy holders that there was coverage except in cases of intentional pollution by the statements that it made to the insurance departments. These statements would have become part of the body of information that was known by persons who obtained insurance coverage for commercial businesses.

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[3] In determining whether plaintiffs have an adequate remedy at law, the issue is not whether plaintiffs will prevail in a contract action but, rather, whether a contract action based on the insurance policy is a vehicle for raising this claim. The merits of this claim will be considered in a breach of contract claim. See *Lower Paxton Township v. U.S. Fidelity and Guaranty Co.*, 557 A.2d at 402-03 n.5.

This is also a claim that may be raised in an action at law through a breach of contract claim based on the insurance company's obligations under its insurance policies. In a breach of contract action where the terms are known or understood in a peculiar sense, evidence is admissible to show both parties' understanding of the meaning of the terms of an agreement. *Restatement (Second) of Contracts* §201; *Resolution Trust Corp. v. Urban Redevelopment Authority of Pittsburgh*, 638 A.2d 972, 975-76 (Pa. 1994). Furthermore, in a breach of contract action, a party will be barred from relying on the provisions in a contract that are inconsistent with statements that this party made to the other party to the contract regarding the terms of the contract where there was reasonable reliance on these statements. *Tonkovic v. State Farm Mutual Automobile Insurance Company*, 521 A.2d 920 (Pa. 1987).

For these reasons, plaintiffs have an adequate remedy at law for the claims described in this Part II of the Opinion.

III.

I next consider what appears to be plaintiffs' primary claim. Plaintiffs argue that they are entitled to the coverage that the Insurance Department believed that Pennsylvania's policy holders were obtaining on the basis of the representations of the insurance industry to the Insurance Department. The thrust of plaintiffs' argument is that the courts should not decide the coverage issue solely by considering the language of a standard insurance agreement. Standard insurance contracts are contracts of adhesion. The insured does not have any bargaining power and must adhere to the terms of a form contract which are not negotiable. *Ferguson v. Lakeland Mutual Insurance Company*, 596 A.2d 883, 885 (Pa. Super. 1991). In recognition of this fact, legislation has created a regulatory process through which an insurance department protects the interests of policy holders. The purpose of the regulatory scheme is to create a balance between policy holders and insurance companies that would not be achieved if the insurance industry was not regulated. This balance would be undermined if policy holders did not receive the protections which the insurance companies advised the regulatory agency that they were providing. Thus, policy holders are entitled to the protections which the Insurance Department believed that it was providing to policy holders when it approved the use of the standard pollution exclusion.

This argument differs from the argument described in Part I of this Opinion. Plaintiffs are not saying that the language in the policy provides protection for property damage caused by the gradual release of pollutants. They are saying that when they purchased a standard CGL policy, they knew that they would receive whatever protection the insurance company was required to provide. In fact, they may very likely say that they did not bother reading the policy because they could not do anything about the scope of the protection.

This argument also differs from the argument raised in Part II of this Opinion because plaintiffs are not stating that they had any expectation that there would be coverage for property damage from the gradual release of pollutants. They are simply stating that they received whatever protection the insurance companies should have provided.

Plaintiffs' argument is that the protections to which they are entitled arise out of the regulatory scheme rather than language in the insurance policy or representations made by the insurance industry and known to plaintiffs regarding the scope of the coverage. Plaintiffs' claim is much like a claim based on a minimum wage law. They are entitled to receive the minimum protections provided for through the regulatory scheme where contract law provides less protection.

The New Jersey Supreme Court's ruling in *Morton International Inc. v. General Accident Insurance Co. of America, supra*, supports plaintiffs' position. The Court concluded that the requirement that the discharge be "sudden" possesses a temporal element generally connoting an event that begins abruptly and without prior notice or warning. Thus, if the coverage issue is governed by the language in the policy, coverage would not include property damage from continuous or repeated exposure to conditions. However, the Court held that notwithstanding its literal terms, the standard pollution exclusion clause should be construed in a manner consistent with the reasonable expectations of the New Jersey

insurance regulatory authority. Consequently, the Court interpreted the clause to preclude coverage only in cases in which the insured intentionally discharged a known pollutant.

In reaching this result, the New Jersey Supreme Court relied on the statement in the explanatory memorandum to the state regulatory bodies set forth in this Opinion at 8, *supra*. The Court said that the first sentence of the explanation ("Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence") was untrue because the 1966 version of the CGL policy covered property damage from gradual pollution. The Court found the second sentence ("The above exclusion clarifies this situation so as to avoid any question of intent") to be "even more misleading than the first." 629 A.2d at 852. The Court said that:

> To describe a reduction in coverage of that magnitude as a "clarification" not only is misleading, but becomes perilously close to deception. Moreover, had the industry acknowledged the true scope of the proposed reduction in coverage, regulators would have been obligated to consider imposing a correlative reduction in rates. *Id.* at 853.

Furthermore, the Court found that the explanatory memorandum's "lack of clarity was deliberate." *Id.*

Assuming that I accept the argument that under a doctrine of regulatory estoppel, the pollution exclusion clause must be construed in a manner consistent with the statements that the insurance industry made to the Pennsylvania Department of Insurance as described in plaintiffs' complaint, plaintiffs must still establish that an equity action is the only cause of action through which the Pennsylvania courts may adequately consider this regulatory estoppel claim.

Possibly, this regulatory estoppel claim could not be raised in a lawsuit based on an insurance policy if there were no provisions in the policy that provide coverage. However, in the pollution coverage cases, the regulatory estoppel claim arises in the context of the scope of an exclusion. The policy provides coverage for an occurrence which includes damages resulting from continuous or repeated exposure to a pollutant. The issue is whether the insurance company should be able to defeat its obligation to provide coverage for property damage liability arising out of an occurrence because of the pollution exclusion within the policy.

Plaintiffs' regulatory estoppel claim is based on public policy; the enforcement of the pollution exclusion in a manner that differs from the insurance industry's representations to the Insurance Department would undermine Pennsylvania's regulatory scheme. Under established principles of contract law, a court shall refuse to enforce a term of an agreement if the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms. *Restatement (Second) of Contracts* §178; *Central Dauphin School District v. American Casualty Company*, 426 A.2d 94 (Pa. 1981); Consequently, plaintiffs may raise the argument that enforcement of the pollution exclusion is against public policy in a contract action to recover damages arising out of an occurrence.

Also, the rationale utilized by the New Jersey Supreme Court in *Morton International, Inc., supra,* permits the regulatory estoppel claim to be raised in a contract action based on an insurance agreement. This opinion cited case law which allows an insured to raise the issue of estoppel to defeat limitations in a standard form policy where the insurance company's agent had represented that the coverage was broader than that contained in the policy. The Court stated that an insurance doctrine closely related to estoppel holds that an insurance contract should be enforced in accord with the objectively-reasonable expectations of the insured. The Court concluded that since the interests of the policy holders are protected through the insurance regulatory authorities rather than through any bargaining between the insurance company and the policy holder over the terms of the policy, the reasonable expectations of the insurance regulatory authorities should be imputed to the policy holders to whom the CGL policies with standard pollution exclusion clauses were

issued after the clause had been approved on the basis of the explanatory memorandum. For this reason, the Court held that the standard pollution exclusion clause "*will be construed* to provide coverage identical with that provided under the prior occurrence-based policy." 629 A.2d at 875 (emphasis added).

Pennsylvania, like New Jersey, permits recovery in a contract action on an insurance policy on the basis of the reasonable expectations of the policy holder where an agent for the insurance company misrepresents the scope of coverage. *Tonkovic v. State Farm Mutual Automobile Insurance Co.*, 521 A.2d at 923-25; *Rempel v. Nationwide Life Insurance Company, Inc.*, 370 A.2d 366 (Pa. 1977); *Pekular v. Eich*, 513 A.2d 427, 431 (Pa.Super. 1986). Since the regulatory estoppel doctrine recognized in *Morton International, Inc.* is derived from this line of cases, the claims based on the regulatory estoppel doctrine are contract claims.[4]

In summary, the New Jersey Supreme Court in *Morton International* based its result on its conclusion that "[a]s a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution exclusion clause to state regulators." 629 A.2d at 874. If the Pennsylvania courts agree with the New Jersey Supreme Court that as a matter of equity and fairness insurance companies should be barred from construing the pollution exclusion clause in a broader manner than that represented in the explanatory memorandum submitted to the Pennsylvania regulators, the well-recognized doctrines of contract law that I have described are appropriate vehicles for reaching this result in a lawsuit by plaintiffs against defendants based on the CGL policies which defendants issued.

IV.

Plaintiffs' final argument is that equity is always available to provide relief for causes of action based on fraudulent conduct.

The first problem with plaintiffs' argument is that it appears to conflict with Pennsylvania case law which holds that a promise to do something in the future is enforceable only through a contract action. Plaintiffs' fraud claims are based on the insurance companies' interpreting the pollution exclusion clause in a broader manner than the construction that the companies gave to the exclusion when they sought regulatory approval for use of the exclusion. However, what the pollution exclusion means is not a "fact." Plaintiffs are accusing defendants of representing that they would construe the pollution exclusion in dealings with policy holders in a manner consistent with the interpretation that they used when they sought regulatory approval. Consequently, this was a promise to do something in the future, and there is Pennsylvania case law holding that a promise to do something in the future which is not kept is not fraud. *Bash v. Bell Telephone Co. of Pennsylvania*, 601 A.2d 825, 832 (Pa.Super. 1992); *Krause v. Great Lakes Holdings, Inc.*, 563 A.2d 1182, 1187-90 (Pa.Super. 1989).

However, even assuming that plaintiffs' equity action is based on fraudulent conduct, the cases which plaintiffs cite for the principle that they may pursue an equity action wherever they seek to rectify the consequences of a fraud all involve claims for which equity can provide complete relief. Plaintiffs do not cite a single case which allows a party to bring an equity action that will not provide complete relief as a prelude to the institution of an action at law that will provide full and complete relief.

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[4] I believe that in this case the regulatory estoppel doctrine is a defense to the pollution exclusion; thus, the doctrine would bar defendants from defeating claims based on the provisions of the insurance agreement covering damages arising out of an occurrence. However, if the doctrine is instead characterized as expanding defendants' promise to provide coverage, plaintiffs may seek recovery through a misrepresentation claim. See *Schneider v. Lindenmuth-Cline Agency*, 620 A.2d 505, 512 n.2 (Pa.Super. 1993) (concurring and dissenting opinion). There is still an action at law that will provide complete relief to plaintiffs.

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Plaintiffs cite the following cases in support of their assertion that equity always assumes jurisdiction over fraud, misrepresentation and civil conspiracy: *Benjamin v. Foidl,* 109 A.2d 300, 301 (Pa. 1954) (plaintiffs were not required to resort to the National Labor Relations Board; state court jurisdiction upheld even though injunction sought involved two labor unions); *Zoni v. Importers & Exporters Insurance Co. of New York,* 12 A.2d 575, 577 (Pa. 1940) (where plaintiff sought to set aside an appraisement of fire loss, the Court stated that "[i]t is a well-established principle that where an umpire has been appointed, ...an award reached by the umpire and one of the appraisers, without conference with the other appraiser, or notice to him or the insured, is invalid"); *Rupel v. Bluestein,* 421 A.2d 406, 410 (Pa.Super. 1980) (citations omitted) (emphasis added) (plaintiff sought to compel father's attorney to disclose whereabouts of plaintiff's children; the opinion said that where plaintiff has alleged the commission of a crime and violation of court orders, equity has jurisdiction; opinion also said "Courts in equity are *also* competent to exercise jurisdiction over cases of fraud"); *Safeguard Mutual Insurance Co. v. Huggins,* 361 A.2d 711, 712 (Pa.Super. 1976) (plaintiff insurance company instituted suit in equity to cancel and rescind contract of life insurance allegedly induced by fraudulent misrepresentation of the insured); *The Maccabees v. Cappas,* 64 A.2d 513 (Pa.Super. 1949) (bill in equity praying for cancellation of policy of life insurance based on alleged false answers by insured in application); *Fishel v. McDonald,* 60 A.2d 820, 822 (Pa.Super. 1948) (emphasis added) (grantor sought reinstatement of lien of mortgage which had allegedly been divested through fraud; the Court said "an allegation of fraud coupled with a prayer for an *appropriate and characteristic equitable remedy* always calls forth the powers of the chancery court"); *Overmiller v. Town and Village Insurance Service,* 21 A.2d 411, 412 (Pa.Super. 1941) (plaintiff sought cancellation and surrender of release due to fraud).

While there is language in some of the courts' opinions that is consistent with plaintiffs' claim that a party may always bring an equity action to vitiate the gains from fraudulent conduct, the courts' rulings do not support plaintiffs' claims. In the cases of *Safeguard Mutual Insurance Co. v. Huggins, supra, The Maccabees v. Cappas, supra,* and *Overmiller v. Town and Village Insurance Service, supra,* the plaintiffs sought to cancel written instruments and the courts relied on the rule that the concurrent jurisdiction of equity should be exercised when the instrument sought to be cancelled has been fraudulently obtained. Similarly, in *Zoni v. Importers & Exporters Insurance Co. of New York,* 12 A.2d at 576, which contains the often-quoted statement "chancery always assumes jurisdiction in relief of fraud and this is so whether or not the remedy in equity is more efficacious or adequate than an action at law," the plaintiff was seeking the cancellation of a fire loss appraisal obtained by fraud. In *Fishel v. McDonald, supra,* the equity action provided full and complete relief. In *Benjamin v. Foidl, supra,* the court never discussed equity versus law. *Rupel v. Bluestein, supra,* has no precedental value because one of the members of the three-judge panel only concurred in the result and the other panel member dissented; furthermore, equity would provide more appropriate relief.

In contrast, there is language in other appellate court opinions stating that an equity action is not automatically available in cases of fraud. In *Setlock v. Sutila,* 282 A.2d 380, 381 (Pa. 1971) (citations omitted), a statement in assumpsit and a confession of judgment were filed attacking an allegedly fraudulent mortgage bond. The Pennsylvania Supreme Court stated:

> Appellant urges the present case is properly within the purview of a bill in equity because of the allegation of fraud. Although fraud, of which forgery is a glaring example, is one of the principal justifications for an equity proceeding, appellants here are not seeking cancellation of a written instrument, but damages only. An action at law is the proper remedy.

The *Setlock v. Sutila* opinion cited *Korona v. Township of Bensalem,* 122 A.2d 688, 689 (Pa. 1956), an equity action brought by purchasers of lots against sellers and the township

for fraudulent representation as to the true legal status of the streets, roads, and drainage facilities. The Supreme Court in *Korona* noted that the court below

> ruled in a lengthy opinion which ended with the conclusion that the plaintiffs had a full, adequate and complete remedy at law, wherefore the court certified the case to the law side of the court. In so doing, the court below acted properly.

See also, *Sixsmith v. Martsolf,* 196 A.2d 662, 663 (Pa. 1964) (citations omitted) where, in an action in equity to reform a contract allegedly secured by fraud and to restrain collection of a note given as part of the purchase price, the Supreme Court said:

> It is well established that a court of equity will not grant relief to one who has a complete and adequate remedy at law. This is so, as a general rule, even though fraud be the basis of the action.

Also, in one of the cases which plaintiffs cited—*Overmiller v. Town and Village Insurance Service,* 21 A.2d at 413, quoting *Prudential Insurance Company of America v. Ptohides,* 186 A. 386, 390 (Pa.Super. 1936)—the Superior Court said:

> "The general rule seems to be that where an instrument has been fraudulently obtained the concurrent jurisdiction of equity should be exercised unless the remedy at law is sufficiently complete and speedy, as compared with the equitable remedy, to make it equally adequate and efficacious."

Plaintiffs' position that it may bring an equity action to eliminate defenses that the opposing party will raise in a breach of contract action is at odds with the well-accepted legal prohibition against piecemeal litigation. If I accept plaintiffs' position, the following are illustrations of what are now garden-variety actions at law that would, if a plaintiff desired, be resolved through an equity action followed by an action at law.

A.

The contractor failed to pay the subcontractor the final $91,000 of the contract price because the job was not completed until July 1, 1996 and the contract contained a liquidated damage provision of $1,000 per day for each day that the job was not completed after April 1, 1996. The subcontractor intends to bring a civil action to recover the $91,000. Prior to bringing this action, the subcontractor would be permitted to bring an equity action to enjoin the contractor from raising the "delay" defense to defeat the claims that the subcontractor will make under the contract between the contractor and subcontractor where the subcontractor alleges that the contractor fraudulently induced the subcontractor to delay starting the job until the contractor had completed the roofing work.

B.

The plaintiff left her job to accept employment with the defendant. The plaintiff was hired to supervise a construction project that would last approximately two years. The plaintiff signed a contract which provided that either party could terminate the employment agreement upon sixty-days' notice. The defendant sent a sixty-day notice terminating the agreement within one month after the plaintiff began her employment. The plaintiff contends that the defendant induced her to leave her prior job by promising that her employment would continue until the completion of the construction project except for cause shown, and that the defendant fraudulently represented that the employment agreement

which the plaintiff signed was a standard form and the sixty-day termination clause did not cover the situation in which an employee was brought in to work on a specific project. Before bringing a civil action based on the breach of the employment agreement, the plaintiff would be permitted to bring an equity action to enjoin the defendant from asserting that the terms of the employment agreement differ from the defendant's representations to the plaintiff.

C.

The plaintiff purchased an office building from the defendant. Within three months after the purchase, the plaintiff experienced severe water problems. The plaintiff repaired the roof at a cost of $100,000. The plaintiff intends to bring an action at law to recover the money spent to repair the roof.

Before bringing the action at law, the plaintiff would be permitted to bring the following equity action. The seller falsely stated that the roof had been replaced five years ago when, in fact, it was last replaced twenty years ago and the seller falsely stated that the water damage which the plaintiff observed prior to signing the agreement of sale involved a minor problem that had been corrected. Before suing to recover the cost of repairing the roof, the plaintiff would be permitted to bring a separate equity action to obtain an injunction barring the seller from relying on a clause in the sales agreement stating that the seller makes no representations concerning the condition of the building, that the buyer is responsible for its own inspection and that the buyer takes the property "as is."

In summary, ordinarily equity will provide a remedy only where there isn't available to the plaintiff a full, complete, and adequate remedy at law. There may be instances in which a party may utilize equity to rectify the consequences of a fraud even though there is an adequate remedy at law[6] (although I believe that the courts, in fact, allow a party who has been the victim of a fraud to pursue an equity action only when the equity action provides a remedy that is superior to any remedy at law). However, equity is never available where an action at law will provide a full, complete, and adequate remedy and where an equity action will not do so.

V.

Because I find that plaintiffs may not pursue this equity action for the reasons set forth in Parts I-IV of this Opinion, I need not consider whether the principles that govern *Vale Chemical Co. v. Hartford Accident and Indemnity Company,* 516 A.2d 684 (Pa. 1986), and its progeny bar this equity action.

For these reasons, I enter the following order of court:

ORDER OF COURT

On this 17th day of July, 1996, upon consideration of defendants' preliminary objections, it is hereby ORDERED that defendants' preliminary objections raising the existence of a full, complete, and adequate nonstatutory remedy at law are sustained.

BY THE COURT
/s/Wettick, J.

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[6] "Equity will assume jurisdiction in cases of fraud *to grant complete relief* to the injured party, notwithstanding the existence of a concurrent remedy at law by an action of assumpsit." 14 Std. Pa. Prac. 2d §79:25 at 113-14 (1983) (emphasis added).

TAB I

*2005 U.S. Dist. LEXIS 15447, **

MID-STATE SURETY CORPORATION, Plaintiff, v. EAST BETHLEHEM TOWNSHIP MUNICIPAL AUTHORITY, and GANNETT FLEMING, INC., Defendants, PALIOTTA GENERAL CONTRACTORS, INC., INLAND WATERS POLLUTION CONTROLS, INC., JOHN HAYS d/b/a BULLS EYE CONSTRUCTION CO., Third-party defendants.

Civil Action 01-240

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

2005 U.S. Dist. LEXIS 15447

July 29, 2005, Decided
July 29, 2005, Filed

DISPOSITION: [*1] Defendant's motion for summary judgment DENIED with respect to counts I (breach of contract) and IX (declaratory judgment). Plaintiff's motion for partial summary judgment DENIED with respect to counts I (breach of contract) and IX (declaratory judgment). Defendant's motion for summary judgment DENIED with respect to counts IV (unjust enrichment) and XII (equitable rescission). Defendant's motion for summary judgment GRANTED with respect to count V (negligence). Defendant's motion GRANTED IN PART with respect to plaintiff's claims in counts VII (negligent misrepresentation), X (fraud), and XI (civil conspiracy) regarding defendant's alleged misrepresentations as to wildcat sewer lines and defendant's alleged failure to follow the One Call Act and DENIED in all other respects.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff surety company and defendant municipal authority cross-moved for summary judgment in the surety's action alleging, inter alia, negligence, breach of contract, negligent misrepresentation, fraud, and civil conspiracy.

OVERVIEW: This suit arose out of a sewer project. The crux of the cross-motions concerned interpretation of a takeover agreement provision. The surety contended the extrinsic evidence confirmed that "liability" referred to its out-of-pocket obligation to expend money on the project up to the penal sum of its performance bond and did not refer to some ensuing obligation to the authority in the event the project stopped short of completion. The authority argued "liability" referred to the surety's liability upon default of the original contract, as opposed to a cap on the surety's overall liability as to the project. A review of the agreement and the extrinsic evidence led the court to conclude that "liability" was ambiguous. The phrase "Surety's liability" was not qualified by language that could aid the court in interpreting its meaning. Examining the context of the agreement, it was unclear whether the paragraph was a specific contractual provision that trumped the general requirement for the surety to complete all work under the terms of the original contract. Evidence of trade usage did not clear up the ambiguity. It was for the trier of fact to determine which interpretation was correct.

OUTCOME: The authority's motion for summary judgment was granted as to negligence,

and granted in part as to negligent misrepresentation, fraud, and civil conspiracy. The surety's motion for summary judgment was denied in its entirety.

CORE TERMS: takeover, penal sum, surety's, performance bond, ambiguous, summary judgment, completion, ambiguity, bid, extrinsic evidence, contractual, obligee, misrepresentation, default, estimate, contractor, venture, sewer, contract price, exhausted, unjust enrichment, latent ambiguity, proffered, cap, proposed agreement, indebt, bonded, final agreement, respect to counts, original contract

LEXISNEXIS® HEADNOTES ⊖ Hide

Civil Procedure > Discovery > Methods > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Summary Judgment > Supporting Materials > General Overview

HN1 Fed. R. Civ. P. 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-moving party, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

HN2 A motion for summary judgment will not be defeated by the mere existence of some disputed facts, but will be defeated when there is a genuine issue of material fact. In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the non-moving party. More Like This Headnote

Civil Procedure > Summary Judgment > Standards > General Overview

HN3 The court may consider any material or evidence that would be admissible or usable at trial in deciding the merits of a motion for summary judgment. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN4 The goal of contract interpretation is to discover the parties' objective mutual intent. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN5 In undertaking the interpretation of a contract under Pennsylvania law, the court must begin with the language of the contract itself. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Defenses > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN6 In interpreting a contract, Pennsylvania law follows the presumption that the parties' mutual intent can be ascertained by examining the writing. Thus, where the intention of the parties is clear, there is no need to resort to extrinsic aids or evidence. There is an exception to this general principle: if the court determines that a contract is ambiguous, the parties are permitted to introduce extrinsic

evidence in order to resolve the ambiguity. The threshold question of whether the contract is ambiguous is an issue of law for the court to decide. If the court finds the contract is ambiguous, the ambiguity must be resolved by the trier of fact. More Like This Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN7 Because the threshold determination of whether a contract is ambiguous is a province of the court, courts have developed points of reference to aid in making the determination whether a contractual term is ambiguous. For example, the United States Court of Appeals for the Third Circuit, interpreting Pennsylvania law, has stated that a contractual term is ambiguous if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. More Like This Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN8 A court must consider the words of a contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning in determining whether a term is ambiguous. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN9 A court must interpret trade terms, legal terms of art, numbers, common words of accepted usage and terms of a similar nature in accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent. More Like This Headnote

Contracts Law > Defenses > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Offers > General Overview

HN10 The party asserting that a contractual provision is ambiguous may resort to extrinsic evidence to support its claim that a specific term or phrase is a latent ambiguity. The extrinsic evidence, however, cannot be utilized to show that the parties intended something different that was not incorporated into the contract. In other words, the ambiguity inquiry must be about the parties' objective linguistic reference. When determining whether a latent ambiguity exists, the parties' expectations, standing alone, are irrelevant without any contractual hook on which to pin them. Instead, a party offers the right type of extrinsic evidence for establishing latent ambiguity if the evidence can be used to support a reasonable alternative semantic reference for specific terms contained in the contract. Thus, extrinsic evidence presented to establish a latent ambiguity may be used to support an alternative interpretation of a term that "sharpens" the term's meaning, but may not be used to support an interpretation that "completely changes" the meaning of the term. More Like This Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > Patent Ambiguities
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN11 There are two types of ambiguities. A patent ambiguity is one that appears on the face of a contract and is the result of defective or obscure language. A patent

ambiguity is apparent just from reading the contract without having to know anything about how it interacts with the world. In contrast, a latent ambiguity arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous. More Like This Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN12 A contractual term is ambiguous if it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN13 Custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts and does not depend on any obvious ambiguity in the words of the contract. More Like This Headnote

Contracts Law > Remedies > Election of Remedies
Contracts Law > Types of Contracts > Guaranty Contracts

HN14 When a contractor defaults under the terms of its contract, its surety generally chooses one of two options: (1) pay the penal sum of the performance bond; or (2) enter into a takeover agreement and perform the work of its principal. If the surety elects to perform the work of its principal in order to reduce its potential costs -- i.e., attempts to complete the project for less than it would cost to simply remit to the project owner the penal sum of the performance bond -- the surety is liable without regard to the penal sum unless it is able to obtain a clause in the takeover agreement limiting the surety's liability in the course of performance to the original bond penalty. That kind of clause, if it appears in a takeover agreement, is known as an absolute limitation on liability to the penal sum of the bond. More Like This Headnote

Contracts Law > Remedies > Equitable Relief > General Overview
Contracts Law > Types of Contracts > Implied-in-Law Contracts

HN15 A plaintiff may not maintain an unjust enrichment claim where a written contract exists between the parties. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Contracts Law > Remedies > Election of Remedies

HN16 There is a distinction between election of inconsistent remedies and election of a particular legal theory to pursue a claim, and a plaintiff should not be forced to elect a particular legal theory in pursuing a claim prior to trial. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Contracts Law > Remedies > Election of Remedies
Contracts Law > Remedies > Restitution

HN17 Where a plaintiff alleges it was defrauded in a contract, the plaintiff may either (1) rescind the contract and recover restitution damages or (2) affirm the

contract and recover damages on the basis of the fraud. More Like This Headnote

Business & Corporate Law > Agency Relationships > General Overview

Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > Vicarious Liability > General Overview

HN18 In the context of vicarious liability, a principal is liable to third parties for the frauds, deceits, concealments, misrepresentations, torts, negligent acts and other malfeasances of his agent, even though the principal did not authorize, justify, participate in or know of such conduct or even if he forbade the acts or disapproved of them, as long as they occurred within the agent's scope of employment. More Like This Headnote

COUNSEL: For MID-STATE SURETY CORPORATION, Plaintiff: Cornelius J. O'Brien, Scott D. Cessar, Eckert, Seamans, Cherin & Mellott, LLC, Pittsburgh, PA.

For EAST BETHLEHEM TOWNSHIP MUNICIPAL AUTHORITY, Defendant: Josh A. Carroll, Washington, PA; Michael J. Witherel, Pittsburgh, PA.

For GANNETT FLEMING, INC., Defendant: Mark J. Gesk, Paul M. Mannix, Wayman, Irvin & McAuley, Pittsburgh, PA.

For GANNETT FLEMING, **[*2]** INC., ThirdParty Plaintiff: Mark J. Gesk, Paul M. Mannix, Wayman, Irvin & McAuley, Pittsburgh, PA.

For PALIOTTA GENERAL CONTRACTORS, INC., ThirdParty Defendant: Peter H. Thomson, Sewickley, PA.

JUDGES: Joy Flowers Conti, United States District Judge.

OPINION BY: Joy Flowers Conti

OPINION

MEMORANDUM ORDER

CONTI, District Judge

In this memorandum order, the court considers the final two cross-motions for summary judgment filed by the principal parties involved in this suit that arose out of a costly sewer project in East Bethlehem Township, Pennsylvania. [1] Specifically, the court considers the cross-motions for summary judgment filed by defendant East Bethlehem Township Municipal Authority ("defendant" or "EBTMA") and plaintiff Mid-State Surety Corporation ("plaintiff" or "MSS"). EBTMA filed a motion for summary judgment with respect to the claims contained in counts I, IV, V, VII, IX, X, XI and XII of plaintiff's complaint and the amendment to plaintiff's complaint. [2] Plaintiff in its response to the motion agreed that count V (negligence) should be dismissed and disputes the remainder of defendant's arguments. In addition, plaintiff filed a motion for partial summary judgment with **[*3]** respect to counts I (breach of contract) and IX (declaratory judgment) of its complaint and the counterclaim asserted in defendant's answer (Doc. No. 21, PP43-48). After reviewing the submissions of the parties and the voluminous record, plaintiff's motion for partial summary judgment shall be denied in its entirety. Defendant's motion for summary judgment shall be granted as to count V (negligence) in its entirety, and granted in part as to counts VII (negligent

misrepresentation), X, (fraud) and XI (civil conspiracy) of plaintiff's complaint regarding defendant's alleged misrepresentations as to wildcat sewer lines and alleged failure to comply with the Pennsylvania One Call Act, PA. STAT. ANN. tit. 73, §§ 176, *et seq.* In all other respects defendant's motion shall be denied, and the case shall be set for trial.

FOOTNOTES

1 The court previously granted the motion for summary judgment filed by third-party defendant Inland Waters Pollution Controls, Inc. See March 31, 2005 Mem. Op. (Doc. No. 171). The court also previously granted in part and denied in part the motion for summary judgment filed by defendant Gannett Fleming. See June 30, 2005 Mem. Op. (Doc. No. 189). **[*4]**

2 Plaintiff's claims against EBTMA include: breach of contract (count I); unjust enrichment (count IV); negligence (count V); negligent misrepresentation (count VII); and declaratory judgment (count IX). Plaintiff also filed an amendment to the original complaint, which added claims against defendant for fraud (count X), civil conspiracy (count XI), and equitable rescission (count XII). Defendant's motion for summary judgment challenges all of plaintiff's claims.

Background

3

FOOTNOTES

3 The statement of facts filed by the parties focuses exclusively upon the dispute over the proper interpretation of the Takeover Agreement between MSS and EBTMA. The parties' respective briefs, however, reference the arguments made by MSS and Gannett Fleming ("GF") in GF's motion for summary judgment, including the statement of facts filed in accordance with that motion. Accordingly, the court will briefly recite the facts set forth in its memorandum opinion issued on June 30, 2005 (Doc. No. 189), supplementing those facts with the additional evidence submitted by the parties with respect to the Takeover Agreement. For a more extensive factual background relating to the negligence misrepresentation and fraud claims (counts VII and X of the complaint), the parties are directed to review the June 30, 2005 memorandum opinion.

[*5] I. The bid process for Contract # 1

In 1991, a feasibility study was prepared with respect to the design of a new sanitary sewer system in East Bethlehem Township, Pennsylvania. EBTMA, the owner of the project, retained Gannett Fleming ("GF") to provide engineering services on the project pursuant to an engineering services agreement and various amendments to that agreement. The project was funded in part by Rural Utility Services ("RUS"), an agency of the United States Department of Agriculture. For planning, bidding, and construction purposes, the work on the project was broken down into five different contracts:

. Contract # 1 -- Construction of Sanitary Sewers; [4]

. Contract # 2 -- Sewage Pump Stations;

. Contract # 3 -- Sewage Treatment Plant;

. Contract # 4 -- Plumbing and Heating for Plant; and

. Contract # 5 -- Electrical Work for Plant.

FOOTNOTES

4 Contract # 1 was divided into four subparts: A, B, C and D.

In the original feasibility study in 1991, GF estimated the cost of Contract # 1 at $ **[*6]** 3,586,000. The drawings that resulted from the 1991 feasibility study did not include any notations showing rock overhangs made by a previous engineer who prepared design plans for a sewer project in 1973. Over the next several years, communications took place between GF engineers and RUS engineer Korah Abraham regarding the proper cost per linear foot of the project. GF estimated that a cost of approximately $ 80 - $ 100 per linear foot was appropriate, while RUS asserted that a the correct price per linear foot was around $ 38 - $ 46. GF became concerned that RUS was "not taking into consideration that there is rock in the project area which will make the cost per linear foot higher." Monroe Dep. at 108-09; Pl.'s App. (Doc. No. 154) Ex. P, Dep. Ex. 45. Specifically, GF was concerned that bids might be higher than estimated project costs, and that the project would no longer be feasible. [5]

FOOTNOTES

5 In addition, GF would not have been compensated for several years of time and expenses in the design phase (valued at $ 250,000) unless the bids were low enough to make the project economically feasible.

[*7] RUS, GF, and EBTMA eventually arrived at an "agreed upon" cost estimate of $ 7.1 million for the entire cost of the project. That amount included all project costs, construction costs, engineering costs, and legal costs. Of that amount, GF understood that $ 5.4 million was allocated for *construction costs* for the entire project. Despite this understanding, however, GF's project engineer prepared an estimate for *Contract # 1* in the amount of $ 6.576 million in March 1996. The project engineer was subsequently instructed that GF did not "have the budget to argue" with RUS, and was directed to use "the figure in [the] Feasibility Report and concentrate on getting the job done." Monroe Dep. Ex. 77. Following some design changes, the next cost estimate GF prepared for Contract # 1 -- utilizing the same unit prices used in the March 1996 estimate -- was $ 5.45 million. [6] In 1999, GF prepared a final cost estimate. The project manager who prepared the estimate, Jack Rae, determined that a unit cost of $ 50 per lineal foot was appropriate. This estimate, however, was too high for the amount of funding available for Contract # 1, which Rae determined to be $ 3.156 million. In order **[*8]** to adjust the estimate to the amount of funding available, Rae made a mathematical calculation and reduced the unit cost to $ 42.09 per lineal foot. That calculation was not based upon any reduction in the scope of the project or in response to any requested design changes; rather, the reduction was based solely upon the construction budget. Rae Dep. at 52-53.

FOOTNOTES

6 The date at which this cost estimate was prepared is unclear from the record.

As explained more fully in the court's June 30, 2005 memorandum opinion regarding GF's

motion for summary judgment, there is some evidence in the record that GF was aware of mismarked utility lines, unmarked "wildcat" sewer lines, and the existence of rock in the project area. Regarding the problem with mismarked utility lines, RUS requested GF to place a caution note on the design plans so that bidders could adjust appropriately their bids. A GF internal memorandum dated February 17, 1997, stated that GF was going to: "Place a notation on each plan sheet in a 'caution' format, **[*9]** that the owners of the various utilities may not know exactly where the utility is." GF App. I (Doc. No. 136) Ex. 11. GF did place a notation on the design drawings. That notation, however, was standard language GF placed on all of its design drawings and did not refer specifically to the fact that utility lines on the drawings may be unmarked or mismarked.

Contract # 1 was advertised for bid in two trade publications, Pittsburgh Construction News and The Dodge Report, respectively on July 20 and 23, 1999. Pittsburgh Construction News listed the estimated price at $ 3.156 million for Contract # 1, while The Dodge Report listed the estimated price for all five contracts at $ 5.4 million. Paliotta General Contractors, Inc. paid the requisite price of $ 200.00 and received a set of contract documents from GF. At the time Paliotta received the contract documents, its bonding capacity as set forth by its surety, MSS, was $ 4 million. Paliotta obtained a bid bond in the amount of 5% of the bid total from MSS prior to submitting its bid, and Paliotta's eventual bid in the amount of $ 3,847,347.55 was the low bid for Contract # 1. After Paliotta was determined to be the low **[*10]** bidder, MSS requested Paliotta to reevaluate its bid numbers because there was a spread between Paliotta's bid of approximately $ 3.8 million and GF's estimate of approximately $ 3.2 million. Paliotta reevaluated its bid, specifically comparing its estimate to defendant's estimate, and subsequently informed MSS that it was confident in its bid. Paliotta claims that this confidence arose, in part, on the basis of a comment made by GF's project manager that Paliotta's bid was "good" and "right in there."

Paliotta received a notice of intent to award the project contract from EBTMA on November 2, 1999. On December 30, 1999, Paliotta entered into a contract with EBTMA to complete the construction of sanitary sewers in East Bethlehem Township (Contract # 1). Id. P7; Pl.'s App. Ex. C. MSS thereafter issued performance and payment bonds to Paliotta for Contract # 1. Def.'s S.F. P8. [7] Paliotta began work on the project and encountered large quantities of rock and over 600 utility interferences. Pl.'s App. Ex. H. These interferences -- which plaintiff claims were known to EBTMA and GF and omitted from the design plans because of fraud and negligence -- impacted Paliotta's ability to meet **[*11]** it contractual obligations to EBTMA. [8]

FOOTNOTES

[7] A payment bond guarantees the payment of subcontractors, suppliers, and laborers. A performance bond "guarantees that [the] contractor will fully perform contract and guarantees against breach of contract." BLACK'S LAW DICTIONARY 1138 (6th ed. 1990).

[8] As discussed more fully in the court's June 30, 2005 memorandum opinion, the parties dispute the extent to which Paliotta (and likewise plaintiff) should have expected rock and utility interferences on the project. The parties further dispute the degree to which plaintiff and Paliotta should have relied solely upon the design drawings and representations of GF in the face of contractual provisions that sought to limit EBTMA and GF's liability for underground interferences.

II. The Takeover Agreement

A. The negotiations over the Takeover Agreement

By early June 2000, it was apparent to all parties involved that Paliotta would be unable to

meet its obligations under its contract with EBTMA, and **[*12]** that Paliotta would have to enter into voluntary default. [9] In connection with this impending reality, MSS began negotiating the terms of a Takeover Agreement with EBTMA that would be correspondingly executed along with a letter establishing Paliotta's voluntary default. [10] On June 23, 2000, B. Michael Bowen, claims manager for MSS faxed Stephen Regish of EBTMA a form copy of a proposed Takeover Agreement under which MSS would perform or procure the remaining work under the contract documents. [11] Def.'s App. (Doc. No. 130) Ex. A at Dep. Ex. 3. Paragraph 11 of that proposed document contained the following pertinent language:

> 11. Obligee agrees that under no circumstances shall Surety's liability exceed the penal sum of its Bond and that all payments made by Surety to any person or entity on account of the work covered by the Contract shall be deemed to be payment under Surety's Bond and shall reduce the penal sum of the Bond in an equal amount. Surety shall not indebt Obligee to any third party for work in excess of the penal sum of the Bond.

Id.

FOOTNOTES

9 It appears that, by early June, Paliotta was unable to meet its obligations under the payment bond, and that MSS was required to step in under its payment bond obligations. See Def.'s App. Ex. A., Dep. Ex. 21; see also Bowen Dep. at 45-46. **[*13]**

10 Paliotta's voluntary default would trigger MSS's obligations under the performance bond, thus necessitating the need for a Takeover Agreement.

11 The fax cover sheet was dated June 22, 2000. The "stamp" at the top of the fax, however, indicates it was sent at 2:56 p.m. on June 23, 2000. Id.

There is no further correspondence in the record between the parties regarding the June 23, 2000 fax. On July 10, 2000, Bowen faxed another form takeover agreement to Regish for his consideration. Pl.'s App. Ex. F. That form agreement contained the identical proposed provision (paragraph 11) referenced above. Id. Regish immediately faxed the form agreement to GF and RUS. Def.'s App. A, Dep. Ex. 5. The next day, RUS sent an email to GF and a fax to EBTMA indicating its "SERIOUS concerns" regarding the proposed agreement. Id. Ex. A, Dep. Ex. 6 (capitalization in original). RUS explicitly stated that the language of proposed paragraph 11 was "UNACCEPTABLE." Id. (capitalization in original); Pl.'s App. Ex. G. [12] In a letter dated July 21, 2000, Josh Carroll, Esq., EBTMA's attorney, responded **[*14]** to plaintiff's proposed takeover agreement. In the letter, Carroll stated that EBTMA and RUS had several concerns over provisions in the proposed takeover agreement, and that, because RUS was the funding agency for the project, RUS was required to concur in any takeover agreement entered into by EBTMA. Pl.'s App. Ex. G. Carroll attached to the letter the "list of concerns" raised by RUS. In order to avoid problems with the proposed agreement, Carroll suggested that Paliotta's contract with EBTMA be assigned to Inland Waters Pollution Controls, Inc, plaintiff's proposed completion contractor. Id.

FOOTNOTES

12 Specifically, RUS stated:

> -- Clause 11: THIS PROVISION IS UNACCEPTABLE. This eliminates the automatic escalation of the bonding capacity as expressly provided in the

performance and payment bonds, and may also serve to limit obligations during the required one-year period following contract completion.

Id. (capitalization in original).

On July 26, 2000, Bowen sent Carroll a copy of a takeover **[*15]** agreement that MSS had entered into with respect to another project. Paragraph 21 of that agreement, which contained language regarding the surety's liability under the takeover agreement, stated as follows:

> 21. Obligee agrees that the Surety's liability will not exceed the penal sum of the Performance Bond and that all payments made in excess of those amounts paid by Obligee to the Surety . . . shall be deemed to be payment under the Surety's Performance Bond and shall reduce the penal sum of the Performance Bond in an equal amount. Surety shall not contract with the Completion Contractor for any extra work without prior written consent of the Obligee.

Pl.'s App. Ex. H. Peter Thomson, counsel for Paliotta, faxed Carroll a letter on August 4, 2000, which stated that a takeover agreement had to be finalized or Paliotta would seek delay damages under the contract. Rev.'d Jt. Stip. Facts (Doc. No. 188) ("R.J.S.F.") P11; Def.'s App. Ex. A, Dep. Ex. 11. That same day, Carroll drafted a proposed takeover agreement using the previous drafts proposed by MSS and the comments to those drafts provided by RUS, GF, and EBTMA. The next day, August 5, 2000, Carroll faxed the proposed **[*16]** takeover agreement to Thomson and Barbara McMillen at RUS. R.J.S.F. P12. Carroll's proposed agreement did not contain any limitation of MSS's liability as to the penal sum as previously set forth in the three MSS proposed takeover agreements. Id.

Thomson responded to Carroll's draft on Monday, August 7, 2000. In a letter to Carroll, Thomson stated that MSS required the language set forth in paragraph 11 of MSS's proposals on June 23, 2000 and July 10, 2000, in order to reach an agreement. Id. P14; Pl.'s App. Ex. I. [13] The next day, Thomson sent Carroll another letter, in which he indicated he received a fax from McMillen objecting to the language set forth in the August 7, 2000 letter. Thomson's letter stated that he "worked out a solution" with RUS, and requested that the following language be added to EBTMA's proposed takeover agreement:

> Obligee agrees that under no circumstances shall Surety's liability exceed the penal sum of its Performance Bond. The balance of the contract price must be exhausted before the penal sum *is reduced.* Surety shall not indebt Obligee to any party to pay for work in excess of the penal sum of the Performance Bond.

Def.'s **[*17]** App. Ex. 1, Dep. Ex. 15 (emphasis added). This proposed language constituted a "third option" -- i.e., it provided that based upon the contract balance (at that time, approximately $ 2.5 million) and the penal sum of the performance bond (approximately $ 3.5 million), EBTMA had enough coverage to complete the project. Def.'s App. Ex. A at 69-70. Under this option, the penal sum would be reduced once MSS made payments for work which were not reimbursed under the original contract. R.S.J.F. P17.

FOOTNOTES

[13] As stated, supra, paragraph 11 stated as follows:

> Obligee agrees that under no circumstances shall Surety's liability exceed the penal sum of its Bond and that all payments made by Surety to any person or

> entity on account of the work covered by the Contract shall be deemed to be payment under Surety's Bond and shall reduce the penal sum of the Bond in an equal amount. Surety shall not indebt Obligee to any third party for work in excess of the penal sum of the Bond.

Def.'s App. Ex. A, Dep. Ex. 3.

Carroll **[*18]** spoke with Regish, McMillen, and a representative about whether the "third option" would provide EBTMA was sufficient funds to complete the project. Id. Ex. 1 at 69. [14] GF told Carroll that they believed the third option was feasible based upon the amount and type of work remaining on Contract # 1. Id. On August 15, 2000, Carroll faxed an EBTMA-proposed takeover agreement to MSS's Bowen. Paragraph 22, as set forth below, contained a slight modification of the so-called "third option":

> 22. The Owner agrees that under no circumstances shall the Surety's liability exceed the penal sum of its Performance Bond. The balance of the contract price must be exhausted before the penal sum *begins to reduce.* The Surety shall not indebt the Owner to any party to pay for work in excess of the penal sum of the Performance Bond.

Def.'s App. Ex. A, Dep. Ex. 18 (emphasis added). In a letter sent along with the proposed agreement, Carroll stated that he made "one minor change in the language submitted by Mr. Thomson for grammatical purposes." Id. Carroll further stated:

> That change was made to the second sentence of paragraph number 22, "The balance of the contract **[*19]** price must be exhausted before the penal sum begins to reduce." The sentence submitted by Mr. Thompson read "The balance of the contract price must be exhausted before the penal sum is reduced."

Id.

FOOTNOTES

[14] Carroll specifically testified in his deposition: "What we had begun to discuss at that point was whether or not we should insert language that's in this letter in order to make it more clear the fact that we would be willing to possibly limit the surety's liability." Def.'s App. I Ex. A at 69.

EBTMA's board met on the evening of August 15, 2000, and requested additional changes to the language of the proposed takeover agreement. On August 16, 2000, Carroll sent a revised copy of the proposed takeover agreement to Bowen. That proposed copy, however, did not contain any changes to the paragraph regarding reduction of the penal sum of the bond. R.J.S.F. P21. Due to other changes in the proposed agreement, however, paragraph 22 became paragraph 20. Pl.'s App. Ex. J. Thereafter, MSS and EBTMA negotiated **[*20]** specifically over paragraph 20. Bowen claims that he requested Carroll to take out of the proposed agreement the second sentence of paragraph 20, which stated: "The balance of the contract price must be exhausted before the penal sum begins to reduce." Def.'s Ex. E, Bowen Aff. P4. [15] Bowen claims that he made the request "out of concern that this sentence may be argued to mean that Mid-State would not receive credit against the penal sum for monies spent in performing the work until the entire contract price had been paid out, which

would mean that Mid-State would not receive credit until all of the work was complete." Id. P5. Carroll does not specifically recall speaking with Bowen or any other MSS representative. He, however, did recall that MSS had objections to the second sentence of paragraph 20. Def.'s App. Ex. A at 82-83.

FOOTNOTES

15 In a faxed copy sent to Regish, Don Morosky of GF crossed out all of the language contained in paragraph 20 referencing a reduction in the penal sum. See Def.'s App. I Ex. A, Dep. Ex. 20.

[*21] On August 21, 2000, Carroll sent Bowen a "final" draft of the takeover agreement. R.J.S.F. P24. In a letter which accompanied the proposed agreement, Carroll wrote: "Please pay attention to paragraph 20. I believe this addresses your concerns." Paragraph 20 of the final takeover agreement stated as follows:

> 20. The Owner agrees that under no circumstances shall the Surety's liability exceed the penal sum of its Performance Bond. The Surety shall not indebt the Owner to any party to pay for work in excess of the penal sum of the Performance Bond.

Pl.'s App. Ex. K. This final version of paragraph 20 deleted the second sentence that was contained in the August 16, 2000 version of paragraph 20 regarding the relationship between the contract price and the reduction of the penal sum of the performance bond.

MSS sent a signed copy of the Takeover Agreement to EBTMA on August 30, 2000. Jt. Concise St. of Facts ("J.C.S.F.") (Doc. No. 187) P25. In a letter sent to Regish along with the signed copy, Bowen wrote that: "Mid-State Surety, in the Takeover Agreement, has agreed to be liable to the full extent of the bond penalty above the contract balance." Pl.'s App. Ex. C. [16] **[*22]** The next day, September 1, 2000, Regish sent Bowen a signed copy of the Takeover Agreement. Id. Ex. D. [17] A letter enclosed with the Takeover Agreement stated: "By executing this Agreement, the Authority expects Mid-State Surety and Inland Waters to provide the necessary resources to complete the project in accordance with the terms of the contract." Id. In a letter to GF vice president Donald Morosky dated October 3, 2000, Bowen wrote that EBTMA was "protected by the underlying Mid-State performance bond as well as the Takeover Agreement between Mid-State Surety and the Authority, *which provides Mid-State Surety is financially liable to the full sum of its performance bond after all contract balances are exhausted.*" Id. Ex. E (emphasis added).

FOOTNOTES

16 Bowen wrote that the purpose of the letter was to "clarify any misunderstandings we may have had in the past." Id.

17 Although the final Takeover Agreement states that it was "executed" August 21, 2000, that date does not seem to be the date that it was signed by all the parties. Regish's letter dated September 1, 2000, indicates that EBTMA signed the Takeover Agreement and returned it to MSS on that date.

[*23] Plaintiff subsequently entered into a "Contract for Completion of Construction Contract" (the "completion contract") with Inland Waters Pollution Controls, Inc., whereby Inland Waters agreed to complete certain work not performed by Paliotta, subject to the

terms of the completion contract. Similar to Paliotta's difficulties, Inland Waters encountered numerous subsurface rock and utility interferences. After plaintiff spent over $ 4.2 million on the project beyond the contract balance subsequent to the execution of the Takeover Agreement -- approximately $ 710,000 in excess of the penal sum of the performance bond -- plaintiff ordered Inland Waters to stop work on the project and brought suit asserting various claims against GF and EBTMA. R.J.S.F. P35.

C. March 28, 2002 memorandum opinion and additional discovery

On September 26, 2001, plaintiff brought a motion for partial judgment on the pleadings (Doc. No. 40) with respect to its declaratory judgment claim at count IX. Plaintiff argued that the language of paragraph 20 of the Takeover Agreement was clear and unambiguous, and that it entitled Midstate to a declaratory judgment: "(i) that Mid-State's liability under the Takeover **[*24]** Agreement is limited to the penal sum of the Performance Bond, $ 3,539,559.75 and (ii) that Mid-State is not liable for any costs to complete the project to the extent that such costs are in excess of the Performance Bond." March 28, 2002 Mem. Op. (Doc. No. 45) at 2. MSS argued that the specific clause in paragraph 20 that stated "under no circumstances shall the Surety's liability exceed the penal sum of its Performance Bond" required MSS to perform work under paragraph 2 of the agreement only until it paid or incurred costs equal to or in excess of the penal sum of the Performance Bond. Id. at 3. In contrast, EBTMA argued that paragraph 20 did not modify paragraph 2, and that MSS was obligated to complete all of the work specified in the original contract. Id. at 4. The court determined that the term "liability" in paragraph 20 was ambiguous. Id. at 5. According to the court:

> . . . "the Surety's liability" in paragraph 20 could refer either to Mid-State's potential legal obligation to pay the Authority for damages upon breach of the Takeover Agreement, or the debt Mid-State would incur during performance through hiring other subcontractors to undertake the actual **[*25]** sewage system construction. Because the ambiguity is contained in the meaning of liability -- whether liability refers to Mid-State's *legal liability to the obligee of the performance bond* (the Authority) upon breach *or debt liability to third-party contractors* -- it is not cured by the phrase "under no circumstances" and *interpretation will require an examination of extrinsic evidence such as trade usage.* Thus, although it is possible that paragraph 20 limits the amount of debt Mid-State is obligated to accrue in the performance of the work, because the language is subject to more than one reasonable interpretation it is ambiguous and judgment on the pleadings is inappropriate.

Id. at 5-6 (emphasis added). [18]

FOOTNOTES

[18] In a footnote to the opinion, the court stated: "The context of the agreement may even lend some support to the Authority's interpretation that *liability* refers to *legal liability for breach,* since the paragraph preceding the one at issue discusses the prevailing party's entitlement to costs and attorneys fees in the event of litigation to enforce the Takeover Agreement." Id. at 6 n.4.

[*26] Following the court's ruling, the parties engaged in discovery in order to aid the court in resolving the ambiguity in the Takeover Agreement. The parties also retained experts to opine on trade usage and custom in the surety industry regarding the language at issue in the Takeover Agreement. MSS retained Thomas E. Crafton, Esq. as its expert. Mr. Crafton stated in his expert report that a surety faced with a performance bond claim

essentially has four options: (1) to finance the bonded contractor in the bonded contractor's completion of the bonded work; (2) to tender to the obligee another contractor along with a check for the difference between the contract balance and the cost to complete the bonded work as determined by the completion contract; (3) to do nothing and allow the bond obligee to complete the bonded work and look to the surety to be reimbursed pursuant to the terms of the performance bond; and (4) to take over the performance of the bonded work and enter into a completion contract with a relet contractor for the completion of the bonded work. Def.'s App. G, Dep. Ex. 313 at 3-4. Mr. Crafton further noted that without a clause in the contract limiting its liability, **[*27]** MSS would not be protected by the penal sum of its bond, but rather would become "a completing contractor faced with the obligations of completing the bonded work without regard to costs." Id.

Mr. Crafton stated that the proposed agreement MSS submitted to EBTMA on July 10, 2000:

> contained conditions which every right thinking surety insists upon prior to entering into a takeover relationship with a performance bond obligee: obligee commits contract funds towards the costs of completing the bonded work (Takeover Agreement Paragraph # 3) and the surety's liability under the Takeover Agreement is limited to the penal sum of the performance bond (Takeover Agreement Paragraph # 11). This condition (limitation or liability) is a limitation upon the surety's obligation to perform ". . . all work not completed under the Contract (Takeover Agreement Paragraph # 2).["] These essential and fundamental takeover agreement conditions are BLACK LETTER LAW for all attorneys and claim representatives involved in the handling of performance bond claims. These essential conditions are prescribed by surety claim handling manuals of all major sureties and these essential conditions are, **[*28]** without exception, set forth in each and every FLSC publication and form agreement relating to surety takeovers. No informed surety would ever enter into a Takeover Agreement without these essential conditions, nor would such actions be approved by the surety reinsurers customarily reinsuring performance bonds.

Id. at 4. [19] Mr. Crafton opined that throughout negotiations into the Takeover Agreement MSS "relentlessly conditioned its agreement to enter into a takeover agreement upon the condition that the penal sum of its performance bond would be 'capped.'" Id. at 4. Mr. Crafton concluded that MSS, "in negotiating the terms of the Takeover Agreement followed precisely the standards and practices in the surety claims industry by insisting on language which limited its completion obligations to an amount equal to the penal sum of its performance bond." Id. at 6.

FOOTNOTES

[19] The July 10, 2000 *proposed* agreement examined by Mr. Crafton was not the final agreement entered into between the parties.

[*29] EBTMA retained Brian E. Downey as its expert. Mr. Downey stated he agreed with the four options a surety has when faced with a performance bond claim as set forth by Mr. Crafton; however, Mr. Downey indicated that a surety in such a situation also has a fifth option: to pay out the penal sum and receive a release from the owner. Mr. Downey also opined that sureties customarily attempt to cap their liability to the penal sum of the performance bond. Mr. Downey stated, however, that takeover agreements capping the surety's liability customarily contain additional provisions that "work in tandem with that penal sum cap" provision. Mr. Downey concluded that the contractual language in the final Takeover Agreement did not contain the language that is customarily utilized to limit a surety's liability to the penal sum of the performance bond. [20]

FOOTNOTES

20 In a hearing held June 10, 2004, the court granted plaintiff's motion to strike Mr. Downey's expert report with respect to those portions of the report that contained legal conclusions as to: (1) whether the Takeover Agreement is ambiguous; and (2) whether MSS breached a fiduciary duty in connection with underwriting the performance bond for Paliotta. See Tr. of hearing held June 10, 2004, at 11. The court held that Mr. Downey's opinion as to the Takeover Agreement would be considered to the extent it examined the custom in the surety industry. The court, however, stated that it would not consider the report with respect to interpreting the specific contractual ambiguity at issue, which is an issue of law for the court to determine. Id.

[*30] *Standard of Review*

*HN1*Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.Civ.P. 56(c). *HN2*A motion for summary judgment will not be defeated by the mere existence of some disputed facts, but will be defeated when there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the non-moving party. Id. at 249. *HN3*The court may consider any material or evidence that would be admissible or usable at trial in deciding the merits of a motion **[*31]** for summary judgment. Horta v. Sullivan, 4 F.3d 2, 8 (1st Cir. 1993) (citing WRIGHT AND MILLER, FEDERAL PRACTICE § 2721); Pollack v. City of Newark, 147 F.Supp. 35, 39 (D.N.J. 1956), aff'd, 248 F.2d 543 (3d. Cir. 1956), cert. denied, 355 U.S. 964, 78 S. Ct. 554, 2 L. Ed. 2d 539 (1956) ("in considering a motion for summary judgment, the court is entitled to consider exhibits and other papers that have been identified by affidavit or *otherwise made admissible in evidence.*") (emphasis added).

Analysis

I. Contract Claims -- Counts I and IX of plaintiff's complaint

A. The parties' interpretation of paragraph 20

The crux of the cross-motions for summary judgment concern the parties' competing interpretations of paragraph 20 of the Takeover Agreement. Plaintiff contends that the extrinsic evidence confirms that the term "liability" in paragraph 20 refers to plaintiff's out-of-pocket obligation to expend money on the project up to the penal sum of its performance bond ($ 3,539,559.75), and does not refer to some ensuing obligation to EBTMA in the event the project stopped short of completion. Pl.'s Br. in Support of **[*32]** Summary Judg. (Doc. No. 128) at 3, 5. Under plaintiff's interpretation of paragraph 20, plaintiff was to receive credit against the penal sum for monies it expended in performing work during the course of the project. In contrast, defendant argues that the term "liability" in paragraph 20 refers to plaintiff's liability upon default of the original contract, as opposed to a cap on plaintiff's overall liability with respect to the project. Def.'s Br. in Support of Summary Judg. (Doc. No. 182) at 5. According to EBTMA, once MSS decided to enter into the Takeover Agreement and perform work under the original contract, MSS was obligated to complete the work. 21 EBTMA contends that paragraph 20 meant that, if MSS did not complete work under the contract,

MSS was "liable to the full extent of its payment bond, but no more." Id. at 6. [22]

FOOTNOTES

21 The court does not find merit in plaintiff's argument that defendant proffered a different interpretation of the contract earlier in the litigation, and that, accordingly, defendant is barred by the doctrine of equitable estoppel from asserting its "current" interpretation of the agreement. Defendant's Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment on the Pleadings (Doc. No. 42) submitted to the court on October 16, 2000, consistently asserted the position that MSS was obligated to complete the work under the original contract, and that MSS would not receive any credit against the penal sum until the contract balance was exhausted. On page 8 of its brief, defendant stated:

> Plaintiff now seeks a ruling that Paragraph 20 of the Takeover Agreement "caps" its liability. The language of the provision does nothing more than maintain the limit on Mid-States's liability for payment of a penal sum. Mid-States [sic] proposed construction of the paragraph would vitiate Paragraph 2, *which requires that the project be completed.* Thus, *the only reasonable reading of the contract as a whole would apply the cap to a situation where Mid-State defaults under the completion contract and becomes liable once again for payment of the penal sum.* Thus, even if Mid-State performs negligently or defaults, *Mid-State's original liability will not increase.* This reasonable interpretation would not permit Mid-State to count invoices and stop work on completion of the project, and also would not result in the unreasonable reading out of the contract the requirement that the *contract be completed by Mid-State.*

Def.'s Br. at 8 (emphasis added). On page 10 of its brief, defendant further stated:

> [A] reasonable construction of this provision is that, if Mid-State defaults in completion, then Mid-State will not be called upon to pay any more than the penal sum. Hence, its "liability" under the performance bond would not have changed, even though it may have expended some monies in attempting completion.

Id. (emphasis added). Finally, page 11 of defendant's brief states:

> Plaintiff seeks a ruling that it is entitled to add up the monies expended in attempting to complete performance, and to simply stop when that amount reaches the penal limit on the bond. This is not a reasonable interpretation of the language at issue. Instead, the only reasonable interpretation of the provision, one that gives effect to Paragraph 2 of the agreement, would apply paragraph 20 *in the event of a default by Mid-State.*

Id. (emphasis added). **[*33]**

22 The parties' competing interpretations can also be viewed as turning on the issue of timing. Both parties agree that there is some form of a "cap" on plaintiff's "liability." The parties disagree, however, on the point at which plaintiff's liability is triggered under the Takeover Agreement. Under defendant's interpretation, plaintiff's "liability" is triggered upon default of its contractual obligations under the Takeover Agreement. Thus, regardless of the amount of money plaintiff spends in an attempt to complete the project, once a breach occurs MSS is liable for the penal sum of its performance bond. Under

plaintiff's interpretation, however, its "liability" began at the point in which it expended costs in excess of the remaining contract balance. Once the threshold of the remaining balance was passed, plaintiff asserts that it could be liable up to the amount of the penal sum, but no more.

B. Pennsylvania Contract Law

In order to decide whether summary judgment is appropriate with respect to either of the parties' competing interpretations, the court will first proceed with an **[*34]** analysis of pertinent Pennsylvania law regarding contract interpretation. [23] HN4 The goal of contract interpretation is "to discover the parties' objective mutual intent." Duquesne Light Co. v. Westinghouse Electric Corp., 66 F.3d 604, 613 (3d Cir. 1995). HN5 In undertaking the interpretation of a contract under Pennsylvania law, the court must begin with the language of the contract itself. Krizovensky v. Krizovensky, 425 Pa. Super. 204, 624 A.2d 638, 642 (Pa. Super. Ct. 1982) (stating that it is "fairly settled" that "the intent of the parties to a written contract is contained in the writing itself."). HN6 Pennsylvania law follows the presumption that "the parties' mutual intent can be ascertained by examining the writing." Duquesne Light Co., 66 F.3d at 613. Thus, "where the intention of the parties is clear, there is no need to resort to extrinsic aids or evidence." Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 661 (Pa. 1982); see also Mellon Bank N.A. v. Aetna Business Credit, 619 F.2d 1001, 1009 (3d. Cir. 1980) ("The strongest external sign of agreement between contracting parties is the words they use in their written contract."). **[*35]**

FOOTNOTES

[23] Paragraph 22 of the Takeover Agreement states that Pennsylvania law governs the contract. Pl.'s App. Ex. 1.

There is an exception to this general principle: if the court determines that a contract is ambiguous, the parties are permitted to introduce extrinsic evidence in order to resolve the ambiguity. Mellon Bank, 619 F.2d at 1011 (3d. Cir. 1980). The threshold question of whether the contract is ambiguous is an issue of law for the court to decide. Id. If the court finds the contract is ambiguous, the ambiguity must be resolved by the trier of fact. Id; see Tigg Corp. v. Dow Corning Corp., 822 F.2d 358 (3d Cir. 1987) (district court erred in granting motion for summary judgment because contract was ambiguous and extrinsic evidence should have been admitted to trier of fact to resolve ambiguity).

HN7 Because the threshold determination of whether a contract is ambiguous is a province of the court, courts have developed points of reference to aid in making the determination **[*36]** whether a contractual term is ambiguous. For example, the United States Court of Appeals for the Third Circuit, interpreting Pennsylvania law, stated that a contractual term is ambiguous:

> if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning.

Duquesne Light Co., 66 F.3d at 614. HN8 The court must consider "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning" in determining whether a term is ambiguous. Mellon Bank, 619 F.2d at 1011. Additionally, HN9 the court must interpret "trade terms, legal terms of art, numbers, common words of accepted usage and terms of a similar nature . . . in

accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent." Id. at 1013.

HN10 The party asserting that a contractual provision is ambiguous may resort to extrinsic evidence **[*37]** to support its claim that a specific term or phrase is a latent ambiguity. Bohler-Uddeholm America, Inc. v. Ellwood Group, 247 F.3d 79, 93 (3d Cir. 2001). [24] The extrinsic evidence, however, cannot be utilized "to show that the parties intended something different that was not incorporated into the contract." Id. In other words, the ambiguity inquiry must be about the parties' objective "linguistic reference." Id. at 93. When determining whether a latent ambiguity exists, "the parties' expectations, standing alone, are irrelevant without any contractual hook on which to pin them." Duquesne Light Co., 66 F.3d at 614-15 n.9. Instead, "a party offers the right type of extrinsic evidence for establishing latent ambiguity if the evidence can be used to support 'a reasonable alternative semantic reference' for specific terms contained in the contract." Bohler, 247 F.3d at 94 n.3 (quoting Mellon Bank, 619 F.2d at 1012 n.13). Thus, extrinsic evidence presented to establish a latent ambiguity may be used to support an alternative interpretation of a term that "sharpens" the term's meaning, but may not **[*38]** be used to support an interpretation that "completely changes" the meaning of the term. Bohler, 247 F.3d at 95 n.4. [25]

FOOTNOTES

24 HN11 There are two types of ambiguities. A patent ambiguity is one that appears on the face of the contract and is the result of defective or obscure language. Baney v. Eoute, 2001 PA Super 260, 784 A.2d 132, 136 (Pa. Super. Ct. 2001). A patent ambiguity is "apparent just from reading the contract without having to know anything about how it interacts with the world." RICHARD A LORD, 11 WILLISTON ON CONTRACTS § 33:40 (4th ed.) In contrast, a latent ambiguity "arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous." Duquesne Light, 66 F.3d at 614. The Pennsylvania Supreme Court stated that "the usual instance of a latent ambiguity is one in which a writing refers to a particular person or thing and is thus apparently clear on its face, but upon application to external objects *is found to fit two or more of them equally*." Steuart, 444 A.2d at 663 (citations omitted, emphasis added). The distinction between patent and latent ambiguities has been deemphasized: "as the law changed and began to emphasize content over form . . . . Coincident with this change in focus has been a significant decline in the importance of the distinction between latent and patent ambiguities. Many courts now concur that the distinction is largely 'an unprofitable subtlety.'" Richard A. Lord, 11 Williston on Contracts § 33:40 (4th ed. 2004). While the court in the memorandum opinion dated March 28, 2002, did not specifically identify the ambiguity in this case as a latent ambiguity, it is apparent to the court that the ambiguity was considered latent. **[*39]**

25 The court of appeals in Bohler further stated that Pennsylvania law established that:

> (1) mere disagreement between the parties over the meaning of a term is insufficient to establish that term as ambiguous; (2) each party's proffered interpretation must be reasonable, in that there must be evidence in the contract to support the interpretation beyond the party's mere claim of ambiguity; and (3) the proffered interpretation cannot contradict the common understanding of the disputed term or phrase when there is another term that the parties could easily have used to convey this contradictory meaning.

Id. at 94-95.

The approach utilized by the United States Court of Appeals for the Third Circuit in Bohler to determine if a contractual term was ambiguous is instructive. In Bohler, the parties entered into an agreement to establish a joint venture to manufacture steel ingots. The joint venture was primarily formed: (a) to allow the defendant to produce its own supply of steel ingots; and (b) to permit the plaintiff, a Swedish corporation, to avoid steel import quotas. **[*40]** Id. at 87. The contract specified that the parties would pay for the joint venture's overhead costs in accordance with the percentage each partner controlled in the joint venture. One clause in the agreement specified that the defendant could receive a rebate from the joint venture if the amount of steel it "purchased" from the joint venture exceeded the defendant's allotted overhead percentage. Id. at 87. [26] After the plant commenced operation, a dispute arose between the parties over the proper interpretation of the term "purchases" in the joint venture agreement. The defendant argued that buying ingots from the joint venture and reselling them to third parties constituted a "purchase" under the agreement. Id. at 88. In contrast, the plaintiff asserted that the joint venture sold the ingots directly to third parties at the defendant's direction, and that the defendant was not entitled to a rebate on such "purchases." Id.

FOOTNOTES

[26] The Agreement specifically provided as follows:

> § 2.3 Price Adjustment or Rebate for Contribution. Within 90 days after the end of each calendar year of Seller [EUS], the prices with respect to the purchase of Products during the preceding calendar year by Buyer [Ellwood] shall be adjusted by way of rebate (after giving effect to quarterly estimated allowances) if Buyer's *Purchases* (net of returns and allowances) in any year constitute more than 80% of the aggregate amount received by Seller in such year in excess of aggregate above defined "base costs" for such year (hereinafter for this Section 2.3 referred to as "Contribution").

Id. at 92 (emphasis added).

[*41] The district court determined that the agreement was ambiguous with respect to the plaintiff's right under the contract to receive rebates on the basis of sales to third parties, and the jury determined that the plaintiff breached the agreement by including third party ingot sales in its rebate calculations. Id. at 90. Upon review of the district court's determination that the contract was ambiguous, the court of appeals affirmed. The court of appeals first examined the plaintiff's proffered "contractual hook," which was that the term "purchases" in the agreement was ambiguous. The court of appeals noted that the plaintiff pointed to several provisions in the joint venture agreement and the business plan that could become meaningless if the defendant's interpretation was accepted. Id. at 97-98. The court of appeals also examined language that the defendant proposed during negotiations but was rejected by the plaintiff and did not become part of the final business plan and agreement. Id. at 98 n.5. [27] Because the court of appeals determined that the plaintiff's "proffered interpretation of these sections does not contradict the common meaning of the terms contained

therein **[*42]** but merely narrows those meanings," the court next examined extrinsic evidence offered by the plaintiff to support its alternative interpretation of the contract. Id. at 98. The extrinsic evidence reviewed by the court of appeals consisted of: (1) testimony of the plaintiff's general counsel regarding the negotiation of the agreement; (2) a proposed business plan the defendant sent to the plaintiff which stated that the primary purpose of the joint venture was to supply ingots to its owners, not to third parties; (3) evidence that all references to "third party purchasers" were deleted in the final version of the agreement; and (4) an affidavit submitted by the plaintiff's president regarding his understanding as to when the defendant was permitted to sell ingots to third parties under the agreement. Id. at 98-99. The court of appeals concluded that the extrinsic evidence the defendant offered in support of its interpretation "supports its reasonable alternative interpretation of the agreement." Id. at 99-100. Thus, the court of appeals held that the district court was correct in determining that the agreement was ambiguous and submitting the issue of the proper interpretation **[*43]** of the contract to the jury to decide. Id. at 100.

FOOTNOTES

27 See also Mellon Bank, 619 F.2d at 1014 (court stated that where clause the plaintiff demanded to be excluded during negotiations was contained in final agreement, and where the plaintiff signed agreement notwithstanding inclusion of the clause, the plaintiff "became bound by the usual meaning" of the clause).

In summary, in determining whether the term "liability" is ambiguous in this case, the court must decide whether the party's proffered "contractual hook" contradicts the common meaning of the term or narrows its meaning. If the interpretation narrows the term's meaning, the court may then consider extrinsic evidence offered by the party to establish a latent ambiguity. If such evidence supports a reasonable alternative interpretation of the agreement, the court may find the contract to be ambiguous. If the contract is ambiguous, the court cannot grant summary judgment as a matter of law, and the finder of fact will ultimately have **[*44]** to weigh at trial the evidence offered by the parties in support of their respective interpretations and determine the proper interpretation of the contract.

C. The term "liability" in the Takeover Agreement is ambiguous and the trier of fact will have to resolve the ambiguity

Applying the above principles of Pennsylvania contract law to the present dispute, the court must first determine whether the term "liability" in the Takeover Agreement is ambiguous. The court begins its analysis at the appropriate starting point: by examining the language of the agreement itself. In this respect, the Takeover Agreement contains the following pertinent provisions:

> WHEREAS, the *Owner desires to effect the completion of said Contract* in order to preserve the work in place and to expedite completion and to avoid delays and inconvenience; and
>
> WHEREAS, the *Surety is willing to exercise its election to complete the Contract* as a measure of cooperation with the Owner providing Surety can be assured that in doing so, it will receive the Contract payments as hereinafter set forth.
>
> * * * *
>
> 2. The Surety agrees to perform or procure *the performance of all work to be* **[*45]** *completed or corrected in accordance with the terms and conditions of the Original Contract* and approved change orders thereto and its Performance

and Payment Bonds, *the terms and conditions of which are incorporated herein by reference*.

3. The Owner acknowledges that the Surety shall receive all contract proceeds upon completion of the work covered by the Contract in the manner specified by the Contract. Accordingly, the Owner acknowledges that the remaining Contract balance, as of the date of the signing of the Agreement, for the completion of the contract is $ 2,575,270.05.

* * * *

11. The parties to this Agreement accept that this Takeover Agreement should not be construed to waive, limit, alter or amend any of the parties obligations, rights, defenses or liabilities under the Bond or the Contract.

* * * *

15. If, for any reason, the terms and conditions of this Takeover Agreement conflict with the requirements, rights, obligations or responsibilities enumerated under the Contract, then the terms and conditions of the Contract shall supersede this Agreement.

16. This Takeover Agreement constitutes the entire agreement between the parties for purposes **[*46]** of the takeover of this project only. The contract entered into between the Owner and the principal remains in full force and effect.

* * * *

19. In the event of litigation to enforce the terms of this Takeover Agreement, the substantially prevailing party shall be entitled to its costs, including reasonable attorney fees to the extent permitted by law.

20. The Owner agrees that under no circumstances shall the Surety's *liability* exceed the penal sum of its Performance Bond. The Surety shall not indebt the Owner to any party to pay for work *in excess of the penal sum of the Performance Bond.*

Pl.'s App. Ex. A (emphasis added).

EBTMA contends that the meaning of the term "liability" is apparent from the term's plain meaning and the language in the corresponding provisions of the contract. According to EBTMA, several provisions in the Takeover Agreement clearly mandate MSS to complete Contract # 1, and that, to accept MSS's interpretation of "liability" would be to nullify those express provisions of the Takeover Agreement that require MSS to complete Contract # 1. See Second Federal Savings and Loan Ass'n v. Brennan, 409 Pa. Super. 581, 598 A.2d 997, 1000 (Pa. Super. Ct. 1991) **[*47]** (stating that one part of a contract cannot be read to annul another part of the contract, and that a contract must be construed, if possible, to effect all of its terms). In addition, EBTMA asserts that the inclusion of paragraph 20 immediately following paragraph 19 (which addresses litigation between the parties over the Takeover Agreement) indicates that, if MSS fails to complete the contract, MSS's liability to EBTMA upon default of its contractual obligations is capped at the penal amount of its performance bond. EBTMA argues that this is a reasonable interpretation of the Takeover Agreement, especially because MSS would be responsible to complete the project regardless of cost once it entered into the Takeover Agreement in the absence of a limitation of liability clause. See First Indem. of Am. Ins. Co. v. Modular Structures (In re Modular Structures), 27 F.3d 72, 74 n.1 (3d Cir. 1994). Finally, EBTMA asserts that the parties' conduct during the

course of performance of the contract -- specifically the letters sent by Bowen to Regish on August 30, 2000, and to Morosky on October 2, 2000 -- compels its proffered interpretation of the contract term. See Pennsylvania Engineering Corp. v. McGraw-Edison, Co., 500 Pa. 605, 459 A.2d 329, 332 (Pa. 1983) **[*48]** (stating that the parties' post agreement conduct is relevant to aid in contract interpretation irrespective of whether the contract is ambiguous).

MSS contends that the term "liability" is not clear and unambiguous under the plain meaning and context of the agreement. In support of its argument, MSS asserts that paragraph 20 is a specific contractual provision that qualifies the general requirements in the "whereas" clause and paragraph 2 to complete the work under the contract. See PBS Coal, Inc. v. Hardhat Mining, Inc., 429 Pa. Super. 372, 632 A.2d 903, 906 (Pa. Super. Ct. 1993). This interpretation is MSS's so-called "contractual hook" in support of its argument that its proffered interpretation "does not contradict the common meaning of the terms contained therein but merely narrows those meanings." Bohler, 247 F.2d at 98. MSS argues that extrinsic evidence clearly establishes its proffered interpretation of the term. Id. at 97 (stating that, when faced with the threshold question of whether the contract is ambiguous, "Pennsylvania law both requires that the court interpret the language without using extrinsic evidence, *and* allows the court to bring in extrinsic **[*49]** evidence to prove latent ambiguity").

Proceeding to the specific term in dispute, the term "liability" is defined by Black's Law Dictionary as follows:

> **liability,** *n.* **1.** The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment. . . . **2.** (*often pl.*) A financial or pecuniary obligation.

BLACK'S LAW DICTIONARY 932 (8th ed. 2004). Under this definition, the term "liability" could reasonably refer to either of the competing interpretations offered by the parties: plaintiff's total financial obligation to defendant after default, no matter what amount of money plaintiff spent in an unsuccessful attempt to complete the contract (defendant's interpretation); or plaintiff's total out-of-pocket obligation to spend up to the penal sum of its performance bond, rather than some ensuing obligation to defendant in the event the project stopped short of completion (plaintiff's interpretation). The major defect of paragraph 20 is that the phrase "Surety's liability" is not qualified by any language that could aid the court in interpreting its meaning. Furthermore, **[*50]** examining the context of the agreement, it is unclear whether paragraph 20 is a specific contractual provision that trumps the general requirement for plaintiff to complete all work under the terms of the original contract. In this respect, the court agrees with the earlier assessment made in connection with the motion to dismiss that the plain meaning of the term "liability" is ambiguous under the reasonable competing interpretations of both parties. See Duquesne Light, 66 F.3d at 614 (stating that *HN12* a contractual term is ambiguous if it is "reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning").

Furthermore, evidence of trade usage advanced by the parties does not clear up the ambiguity. See Sunbeam Corp. v. Liberty Mut. Ins. Co., 566 Pa. 494, 781 A.2d 1189, 1193 (Pa. 2001) *HN13* ("custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts and does not depend on any obvious ambiguity in the words of the contract"). Neither party disputes that *HN14* when a contractor defaults **[*51]** under the terms of its contract, its surety generally chooses one of two options: (1) pay the penal sum of the performance bond; or (2) enter into a takeover agreement and perform the work of its principal. See also March 28, 2002 Mem. Op. at 4 (citing, DEUTSCH, KERRIGAN & STILES, CONSTRUCTION INDUSTRY INSURANCE HANDBOOK

§ 166.4 (1991)). If the surety elects to perform the work of its principal in order to reduce its potential costs -- i.e., attempts to complete the project for less than it would cost to simply remit to the project owner the penal sum of the performance bond -- the surety is liable without regard to the penal sum unless it is able to obtain a clause in the takeover agreement "limiting the surety's liability in the course of performance to the original bond penalty." International Fidelity Ins. v. County of Rockland, 98 F.Supp.2d 400, 429 (S.D.N.Y. 2000). That kind of clause, if it appears in a takeover agreement, is known as an "absolute limitation on liability to the penal sum of the bond." Id. at 430.

In support of their respective positions, both parties retained experts with respect to trade usage. Both experts acknowledged **[*52]** the risk-reward position of a surety electing to enter into a takeover agreement to complete the work of its defaulting principal. Both experts further stated that sureties attempt to include clauses in the takeover agreement that cap the surety's absolute liability to the penal sum of the performance bond. Neither expert, however, expressed a clear opinion as to whether an established trade usage exists with respect to the word "liability." Thus, although both parties' experts agree that sureties often attempt to limit their total costs under takeover agreements to the penal sum of the performance bond, it remains uncertain whether plaintiff was able to accomplish that goal within the confines of the specific agreement at issue in this case. Therefore, the court finds that the term "liability" is ambiguous.

This determination that the term is ambiguous is further supported by extrinsic evidence revealed through discovery. Bohler, 247 F.2d at 97. The parties engaged in extensive discovery into the bargaining history and subsequent conduct of the parties pursuant to the Takeover Agreement in an attempt to determine the meaning of the term "liability" in paragraph 20. **[*53]** The extrinsic evidence set forth in part II.A., supra, reveals that MSS, throughout the bargaining process in the form of contract proposals and letters to EBTMA and GF, insisted that its liability had to be capped at the penal sum of its performance bond. MSS initially proposed language which clearly stated that MSS would receive credit for payments made in excess of the remaining balance under the contract. RUS, however, determined that this language was "unacceptable." Throughout the negotiating process, RUS -- which had to give its approval to the agreement as EBTMA's governmental source of funding -- was steadfast that the Takeover Agreement could not contain any language creating an absolute cap on MSS's liability that could threaten the completion of the project. Thus, EBTMA's first proposed takeover agreement did not contain any limitation of MSS's liability as to the penal sum amount. MSS responded by stating the limitation of liability clause was required to reach an agreement.

In an attempt to undue the stalemate, the parties explored the so-called "third option." Under this option, EBTMA examined whether there was enough coverage under the contract balance (approximately **[*54]** $ 2.5 million) and the penal sum of the performance bond ($ 3.5 million) to complete the project. MSS proposed the following language be inserted into the Takeover Agreement under the "third option:"

> Obligee agrees that under no circumstances shall Surety's liability exceed the penal sum of its Performance Bond. The balance of the contract price must be exhausted before the penal sum *is reduced.* Surety shall not indebt Obligee to any party to pay for work in excess of the penal sum of the Performance Bond.

Def.'s App. Ex. A, Dep. Ex. 15 (emphasis added). Under this option, MSS would receive credit and the penal sum would be reduced with respect to payments made by MSS for work that was not reimbursed under the original contract. EBTMA's attorney proposed the following paragraph, which contained a minor grammatical change that significantly altered MSS's proposed language:

> The Owner agrees that under no circumstances shall the Surety's liability exceed the penal sum of its Performance Bond. The balance of the contract price must be exhausted before the penal sum *begins to reduce*. The Surety shall not indebt the Owner to any party to pay for work in excess **[*55]** of the penal sum of the Performance Bond.

Def.'s App. Ex. A, Dep. Ex. 18 (emphasis added). The "slight modification" in effect suggests that MSS would not receive any credit with respect to its penal sum until the balance of the contract price was exhausted. See Def.'s Ex. E, Bowen Aff. P5. [28] Thereafter, MSS and EBTMA negotiated over the second sentence to paragraph 20.

FOOTNOTES

[28] Despite whether plaintiff would receive any credit against its penal sum under this proposal, the proposal did appear to cap plaintiff's absolute liability to the penal sum of the performance bond.

Ultimately, that sentence was left out of the final agreement in its entirety. Paragraph 20 of the Takeover Agreement stated:

> 20. The Owner agrees that under no circumstances shall the Surety's *liability* exceed the penal sum of its Performance Bond. The Surety shall not indebt the Owner to any party to pay for work *in excess of the penal sum of the Performance Bond*.

Pl.'s App. Ex. A (emphasis added). The flurry **[*56]** of letters sent between the parties after this final proposal reveals a textbook case for concluding that the term "liability" is ambiguous. EBTMA sent MSS a letter along with the final proposed language which stated: "Please pay attention to paragraph 20. I believe this addresses your concerns." This letter creates an objective inference that the term "liability" is ambiguous based upon the prior bargaining history of the parties, and it cuts against EBTMA's argument that the term clearly and unambiguously: (1) required MSS to complete the contract prior to receiving credit against the penal sum; and (2) required MSS to spend out-of-pocket costs in excess of the penal sum. The extrinsic evidence also supports an inference that EBTMA's interpretation of the agreement is "unreasonable" because, under its interpretation of the agreement, MSS would never earn *any* credit under its penal sum. See Pl.'s Br. in Opp. (Doc. No. 149) at 9.

The extrinsic evidence, however, also undercuts plaintiff's interpretation of the agreement. For example, although EBTMA sent MSS a proposal containing the "third option" which at the very least capped MSS's total liability, that language was not **[*57]** included in the final agreement. In Bohler, the court of appeals found persuasive the fact that language which was contained in a draft agreement was left out of the final agreement. Bohler, 247 F.3d at 99. The omission, according to the court of appeals, supported an inference that such an interpretation was not supported by the final agreement. Id. Likewise, the fact that the "third option" was left out of the final agreement supports an inference that it did not become part of the final agreement.

In the end, a review of the language of the agreement and the extrinsic evidence set forth by the parties leads the court to conclude that the term "liability" in paragraph 20 of the Takeover Agreement is ambiguous. At this stage in the proceedings, the function of the court is to determine whether there is an ambiguity in the Takeover Agreement, not to offer an opinion as to which of the competing interpretations is ultimately correct. That is a function for the trier of fact to determine at trial. Mellon Bank., 619 F.2d at 1011. It is sufficient at this point for the court to determine that each of the competing interpretations of the

agreement **[*58]** are reasonable, and that the term "liability" is reasonably susceptible of at least two different meanings. Accordingly, because the court finds that the term "liability" in the Takeover Agreement is ambiguous, the court will deny the parties' cross-motions for summary judgment on counts I and IX.

II. Unjust Enrichment and Equitable Rescission Claims -- Counts IV and XII

Plaintiff brought a claim for unjust enrichment at count IV of its complaint. Plaintiff alleged in count IV that it performed work and provided materials, labor and services for the benefit of EBTMA, and that EBTMA was unjustly enriched at plaintiff's expense. Pl.'s Compl. (Doc. No. 1) PP22-26. Both parties agree that HN15 plaintiff may not maintain an unjust enrichment claim where a written contract exists between the parties. See Mitchell v. Moore, 1999 PA Super 77, 729 A.2d 1200, 1203 (Pa. Super. Ct.). Thus, plaintiff cannot maintain an unjust enrichment claim at count IV in connection with its breach of contract claim.

Plaintiff, however, contends that it may maintain an unjust enrichment claim with respect to the fraud claim at count X of the amendment to plaintiff's complaint. Count X alleges that defendants **[*59]** GF and EBTMA fraudulently induced Paliotta to bid for Contract # 1, for plaintiff to issue performance and payment bonds on Contract # 1, and for plaintiff to enter into the Takeover Agreement. Amdt. to Pl.'s Compl. (Doc. No. 96) PP30-31. Plaintiff argues that if Contract # 1 is rescinded based upon fraud, plaintiff could recover damages, inter alia, under a claim of unjust enrichment. See Shulman v. Continental Bank, 513 F.Supp. 979, 986 (E.D. Pa. 1981) (denying motion for summary judgment with respect to unjust enrichment claim where material issue of fact existed as to whether underlying agreement was enforceable).

The court agrees with plaintiff's position. Plaintiff is permitted to maintain claims for fraud and breach of contract at this stage of the proceedings because the claims, the rights asserted, and the relief requested are not the same. See Cunningham v. Joseph Horne Co., 406 Pa. 1, 176 A.2d 648, 650-51 (Pa. 1961). HN16 There is a distinction between election of inconsistent remedies and election of a particular legal theory to pursue a claim, and a plaintiff "should not be forced to elect a particular legal theory in pursuing a claim" prior to trial. **[*60]** Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 375 A.2d 1285, 1291 (Pa. 1977). Thus, plaintiff is permitted to maintain both its breach of contract claim and fraud claims. To the extent that plaintiff is successful on both claims at trial, plaintiff will have to make an election of remedies so as to avoid double recovery. Wedgewood Diner, 368 Pa. Super. 480, 534 A.2d 537, 538 (Pa. Super. Ct. 1987) (stating that HN17 where a plaintiff alleges it was defrauded in a contract, the plaintiff may either (1) rescind the contract and recover restitution damages or (2) affirm the contract and recover damages on the basis of the fraud); see also Jiffy Lube International, Inc. v. Jiffy Lube of Pennsylvania, Inc., 848 F.Supp. 569, 576-77 ("under [the doctrine of election of remedies], a party alleging fraud in connection with the formation of a contract has a choice: the party may either disaffirm the contract and tender back the consideration received, or affirm the voidable contract and waive the fraud."). Plaintiff may pursue both claims and is not required to make an election of remedies prior to or at trial. Craigie v. General Motors Corp., 740 F. Supp. 353, 359 (E.D. Pa. 1990). **[*61]** Accordingly, because plaintiff is permitted to maintain its fraud claim for rescission of Contract # 1 and the Takeover Agreement, defendant's motion for summary judgment with respect to count IV is denied.

Count XII states a claim for equitable rescission of the Takeover Agreement. In accordance with the rationale set forth above, the court will also deny defendant's motion for summary judgment with respect to count XII.

III. Negligence -- Count V

Count V of plaintiff's complaint contains a claim for negligence against EBTMA. In its response to defendant's motion for summary judgment, plaintiff consented to dismissal of count V. Accordingly, the court will grant defendant's motion for summary judgment with respect to count V.

IV. Negligent Misrepresentation, Fraud, and Civil Conspiracy Claims -- Counts VII, X, and XI

Counts VII, X, and XI of plaintiff's complaint contain claims, respectively, for negligent misrepresentation, fraud, and civil conspiracy. Plaintiff's fraud and negligent misrepresentation claims allege that defendant: (1) inaccurately marked utility lines on plans; (2) failed to comply with the request by RUS to place a "caution note" on the **[*62]** plans; (3) failed to disclose the potential for wildcat sewer lines; and (4) failed to update utility markings pursuant to the One Call Act. With respect to the pending motion for summary judgment as to counts VII, X, and XII, EBTMA and plaintiff adopted the arguments set forth by plaintiff and GF regarding GF's motion for summary judgment. In the memorandum opinion ruling upon GF's motion dated June 30, 2005, the court examined plaintiff's particular fraud and negligent misrepresentation claims in great detail. The court granted summary judgment in part in favor of GF with respect to plaintiff's fraud, civil conspiracy, and negligent misrepresentation claims regarding private wildcat sewer lines and GF's alleged failure to comply with the One Call Act 90 days prior to the bid date. In all other respects, GF's motion for summary judgment on the fraud and negligent misrepresentation claims was denied. For the reasons set forth in the court's June 30, 2005 memorandum opinion and summarized above, the court will grant this defendant's motion for summary judgment in part as to plaintiff's fraud, civil conspiracy, and negligence claims regarding the private wildcat sewer lines and defendant's **[*63]** alleged failure to comply with the One Call Act 90 days prior to the bid date. See Travelers Cas. & Sur. Co. v. Castegnaro, 565 Pa. 246, 772 A.2d 456, 460 (Pa. 2001) HN18 ("In the context of vicarious liability, a principal is liable to third parties for the frauds, deceits, concealments, misrepresentations, torts, negligent acts and other malfeasances of his agent, even though the principal did not authorize, justify, participate in or know of such conduct or even if he forbade the acts or disapproved of them, as long as they occurred within the agent's scope of employment"). In all other respects, defendant's motion for summary judgment for the claims set forth in counts VII, X, and XI will be denied.

Conclusion

AND NOW, this 29th day of July 2005, upon consideration of the cross-motions for summary judgment filed by plaintiff Mid-State Surety Corporation and defendant East Bethlehem Township Municipal Authority, **THE COURT ORDERS AS FOLLOWS:**

. Defendant's motion for summary judgment is **DENIED** with respect to counts I (breach of contract) and IX (declaratory judgment).

. Plaintiff's motion for partial summary judgment is **DENIED** with respect **[*64]** to counts I (breach of contract) and IX (declaratory judgment).

. Defendant's motion for summary judgment is **DENIED** with respect to counts IV (unjust enrichment) and XII (equitable rescission) which plaintiff represents are based upon defendant's alleged fraud.

. Defendant's motion for summary judgment is **GRANTED** with respect to count V (negligence).

. Defendant's motion is **GRANTED IN PART** with respect to plaintiff's claims in counts VII (negligent misrepresentation), X (fraud), and XI (civil conspiracy) regarding defendant's

alleged misrepresentations as to wildcat sewer lines and defendant's alleged failure to follow the One Call Act and **DENIED** in all other respects.

29 JUL 05

By the court:

Joy Flowers Conti

United States District Judge

CERTIFICATE OF SERVICE

I, Richard A. Ejzak, hereby certify that on this, the 4th day of January, 2008, I caused two (2) true and correct copies of the Brief of Amicus Curiae, United Policyholders, to be served, by First Class U.S. mail, postage prepaid, on the following counsel of record:

Robert C. Heim
Nora Miller
John S. Ghose
Dechert LLP
Cira Centre, 2929 Arch Street
Philadelphia, PA 19104

Ronald P. Schiller
Nicole J. Rosenblum
DLA PIPER
1650 Market Street
One Liberty Place, 50th Floor
Philadelphia, PA 19103

John N. Ellison
Michael Conley
Anderson, Kill & Olick
1600 Market Street, Suite 2500
Philadelphia, PA 19103

Attorneysfor AstenJohnson, Inc.

Jay I. Morstein
DLA PIPER
6225 Smith Avenue
Baltimore, MD 21209

Attorneys for Columbia Casualty Co.

Jacob C. Cohn
Stephen A. Cozen
COZEN O'CONNOR
1900 Market Street
3rd Floor
Philadelphia, PA 19103

Attorneys for American Ins. Co.