EXHIBIT E

Commonwealth of Massachusetts

Supreme Judicial Court for the Commonwealth

No. SJC-06165

Norfolk County

AFFILIATED FM INSURANCE COMPANY

Plaintiff, Appellant

v.

CONSTITUTION REINSURANCE CORPORATION

Defendant, Appellee

On Appeal From A Judgement Of The Superior Court

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION

Thomas W. Brunner
Christopher D. Cerf
John C. Yang
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Rosanna Sattler
BBO No. 442760
Jeffrey W. Armstrong
BBO No. 547160
POSTERNAK, BLANKSTEIN & LUND
100 Charles River Place
Boston, MA 02114
(617) 367-9595

Attorneys for *Amicus Curiae*
American Insurance Association

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INTEREST OF AMICUS CURIAE

The American Insurance Association ("AIA") is a national trade organization representing 252 companies writing property and casualty insurance contracts in every state and jurisdiction of the United States. These companies together write more than $60 billion in combined premiums annually.[1] Together, AIA member companies are affiliated with thousands of independent insurance agents nationwide. A substantial portion of AIA member companies' business is commercial liability insurance. This form of coverage enables American businesses to provide the goods, services, jobs, and investments vital to the country's economic health. In addition, AIA member companies employ more than 145,000 people and contribute $2.2 billion in state taxes and fees (including payroll taxes) to state governments each year.

AIA's purposes include promoting the economic, legislative and public interests of its members and the insurance industry, providing a

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[1] All financial figures are from 1990, the most recent year for which figures are available.

forum for discussion of problems that are of common concern to its members, and serving the public interest through appropriate activities including the promotion of safety and security of persons and property.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether a reinsurer is contractually obliged to pay a proportionate share of the litigation expenses incurred by the reinsured company in opposing an insured's demand for coverage.

STATEMENT OF THE CASE

Amicus incorporates by reference the Statement of the Case set forth in the Brief of the Plaintiff-Appellant Affiliated FM Insurance Company ("Affiliated") on pages 2-4..

STATEMENT OF THE FACTS

Amicus adopts the Statement of Facts set forth on pages 4-9 of Affiliated's brief.

SUMMARY OF ARGUMENT

This case presents a single question: whether a reinsurer is contractually obliged to pay a proportionate share of the litigation expenses incurred by the reinsured company in successfully opposing an insured's demand for coverage? Ignoring the plain language of the applicable agreement, an unbroken line of authority in both this country and Great Britain (including a seminal decision by this Court), the uniform view of treatise writers, and an ancient and heretofore unquestioned practice between and among reinsurers and reinsured, the trial court answered that question in the negative. (Pp. 10-20.)

The Superior Court's conclusions were more than merely erroneous. If permitted to stand, the decision is likely to have staggering consequences for the domestic insurance industry. While the sums at issue in this case are relatively minor, direct (*i.e.*, primary and excess) insurers spend (conservatively) a billion dollars a year in so-called "coverage litigation," typically in the

form of declaratory judgment actions. Permitting reinsurers to escape paying their fair share of these costs confers an unwarranted and historically unprecedented windfall while saddling reinsureds with massive, completely unanticipated costs that inevitably will be borne by policyholders in the form of increased premiums. (Pp. 20-26.)

Such a radical reorientation of the relationship between reinsurers and reinsured has no basis in law. As a result of the historical tradition that reinsurance transactions are a matter of the "utmost good faith between the parties," reinsurance contracts are remarkably short and notably lacking in the legalisms that characterize other complex commercial arrangements. (Pp. 10-12.) Accordingly, from the very advent of reinsurance several centuries ago, dispute resolution has always centered around the guiding principle of "good faith" as informed by the historic customs and traditions of the business. (Pp. 12-13.)

Read in this light, Constitution Re's effort to dissociate itself from the coverage action is plainly unsupportable. Where the denial of coverage is sustained, a reinsurer -- which has contractually accepted a portion of the risk in consideration for a premium paid by the ceding insurer -- is a direct beneficiary of the coverage dispute. (Pp. 13-14.)

But even when a court rules that coverage _is_ required, the reinsurer is inextricably associated with the judgment. Under the express terms of the agreement, a reinsurer agrees to "follow the fortunes" of the reinsured company -- _i.e._, to link its fate to that of the reinsured. Nonetheless, the reinsurer's obligations are "subject to" the terms and conditions of the policy issued to the insured. Put differently, to the extent the direct insurer has a legitimate coverage defense, that defense automatically inures to the benefit of the reinsurer as well. For this reason, reinsurers frequently urge the reinsured to resist coverage when there is a substantial basis for doing so. (Pp. 14-15.)

Moreover, if the reinsured ignores those exhortations -- or simply fails to litigate the coverage issue -- it does so at its peril. With increasing frequency, courts are ruling that the reinsurer is not liable to the reinsured to the extent the latter pays out under a policy where coverage was precluded "as a matter of law."

In short, as reflected by industry custom and as universally approved by courts and commentators alike, reinsurers have a vital stake in coverage litigation and, for that reason, should be required to pay for it. (Pp. 15-20.) Any other interpretation would allow reinsurers to become a "free rider." (Pp. 20-21.) Moreover, it would foment an adversarial relationship between reinsured and reinsurer in a manner at odds with the basic premise of the reinsurance transaction that their interests are aligned. (Pp. 21-22.) In cases of uncertain coverage, a direct insurer often will choose simply to pay out the claim. If, however, the reinsurer is not "on the hook" for declaratory judgment expenses, it has every reason to insist that the company resist coverage

as vigorously as possible -- or risk a fight over reimbursement down the line. The end result is a de facto conflict of interest between reinsured and reinsurer, as well as powerful impetus to invoke scarce judicial resources to resolve coverage issues. Neither consequence is in the public interest. (Pp. 22-23.)

Not surprisingly, the pertinent language of the reinsurance certificate is entirely consistent with these principles. Focusing on Clause A, the Superior Court found that the reinsurer's "liability" was "subject" to the "terms and conditions" of the Campbell Soup policy. (Pp. 23-24.) As the structure of the agreement makes plain, that language merely reflects the basic indemnity relationship of the parties: The reinsurer has the same duties, as well as the same coverage defenses, as the reinsured. Hardly, however, does it follow that "Affiliated's [litigation] expenses are not covered . . . because they would not be covered under the Affiliated/Campbell policy." Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., No. 89-

2411, slip op. at 4 (Mass. Sup. Ct., Norfolk County Sept. 1, 1992) [hereinafter "Op. at __"]. To the contrary, Clause D expressly states that "in addition" to its basic obligation to reimburse Affiliated for losses associated with the underlying litigation (the EEOC/Campbell suit), the reinsurer "shall pay its proportion of expenses . . . incurred by [Affiliated] in the investigation and settlement of claims." (Pp. 24-25.) Indeed, Constitution Reinsurance Corporation's ("Constitution Re") recognition that the certificate requires it to pay some investigation expenses is fatal to its theory: If it has a duty to pay some expenses above and beyond those directly required by the Campbell Soup policy, then that policy does not set out the full universe of its obligations. (P. 26.)

Thus, the only real interpretive question presented in the case is whether the costs of a declaratory judgment coverage action qualify as "expenses incurred in the investigation and settlement of claims." (Pp. 26-27.) The language of the certificate -- which is supported by the

practices of the industry and the caselaw reflecting it -- compel the conclusion that they do. (Pp. 27-28.) In any event, the trial court's holding that such expenses are not covered as a matter of law is insupportable. At most, the phrase "investigation and settlement expenses" is sufficiently ambiguous as to warrant development of a fuller record concerning industry practice and the parties' intent. While AIA believes such an approach to be unnecessary in light of the clarity of the language and the nature of the reinsurer/reinsured relationship, a remand of this nature is the only even theoretical alternative to outright reversal.

ARGUMENT

The nature of the reinsurer/reinsured relationship, as reflected in longstanding, judicially-endorsed industry practice, compels the conclusion that both entities share in the cost of obtaining a judicial declaration of coverage obligations. This relationship, together with the historical expectation that parties to the

reinsurance transaction conduct themselves with "the utmost good faith," necessarily provide essential insight into the meaning of the applicable language in the agreement. Moreover, even if that language were viewed in isolation, it plainly obligates a reinsurer such as Constitution Re to bear its share of the costs associated with resolving the coverage dispute.

I. The Nature of the Reinsured/Reinsurer Relationship, Longstanding Industry Expectations and Associated Considerations of Public Policy Support Affiliated's Contractual Right to Reimbursement of Coverage Litigation Expenses.

As with any contract dispute, careful parsing of the actual language of the Affiliated/ Constitution Re agreement is central to the correct resolution of this case. Nonetheless, the sometimes arcane nuances of the reinsurance transaction as it has evolved over the centuries make it both important and appropriate to put that language in its proper context.[2] Indeed, the

[2] Reinsurance has been described as "a mystery not worth the solving." Henry T. Kramer, (continued...)

legitimacy of this interpretive approach derives from the nature and history of the reinsurer/reinsured relationship. The rather informal arrangements that constitute the origins of modern reinsurance quickly gave rise to an "established tradition that reinsurance transactions are a matter of 'utmost good faith' between the parties." Robert F. Salm, Reinsurance Contract Wording, in Strain, supra, at 79.[3] Reflecting that tradition, a reinsurance agreement typically is "a relatively short, concise document, noticeably lacking in the legalisms" characteristic of other contracts. Id. For this reason, interpretive questions under an agreement traditionally are "settled . . . according to the

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[2](...continued)
Nature of Reinsurance, in Reinsurance 1 (Robert W. Strain ed. 1980) [hereinafter "Strain"]. More to the point, the general absence of standard forms, together with the arcane nature of the transaction, has led one writer to observe that the "wordings [of the reinsurance agreement] do not readily speak for themselves." Id.

[3] See generally Reinsurance Law § A.2 (Robert Merkin ed. 1992) (tracing the history of reinsurance agreements from the fourteenth century).

customs and traditions of the business." Id.[4]

These "customs and traditions" virtually compel an interpretation of the pertinent contract language in the manner urged by Affiliated. In most respects, a reinsurance cession represents a specialized form of an indemnity agreement. American Ins. Co. v. North American Co. for Property & Casualty Ins., 697 F.2d 79, 81 (2d Cir. 1982). In exchange for a premium, the reinsurer agrees to reimburse the ceding insurer for a specified portion of any liability that may arise out of one or more contracts of insurance. The reinsurer further agrees to "follow the fortunes" of the reinsured -- that is, to link its fate to that of the ceding insurer provided that the ceding insurer conducts itself reasonably and in good faith.

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[4] See also James V. Schibley, The Life Reinsurance Contract, in Resolving Reinsurance Disputes: Contracts, Arbitration, Litigation 4 (A.B.A. Torts & Ins. Prac. Sec. 1987) (noting that one important reason that reinsurance functions successfully without extensive legal authority is "the existence of a common body of insurance practices that are generally accepted within the industry.")

Notwithstanding this commitment, however, the reinsurer's obligations are made expressly "subject to" the terms and conditions of the underlying policy. The effect of this provision is to make the reinsurer a derivative beneficiary of any legitimate coverage defense possessed by the reinsured company, e.g., a particular policy exclusion or the insured's failure to satisfy a condition precedent to coverage. Indeed, as courts have frequently observed, the "subject to" clause operates as a potentially significant limitation on the otherwise broad sweep of the reinsurer's general obligation to follow the reinsured's "fortunes." See, e.g., Michigan Millers Mut. Ins. Co. v. North American Reinsurance Corp., 452 N.W.2d 841 (Mich. Ct. App. 1990).

The net effect, and indeed the purpose, of these provisions, viewed together, is to align the respective interests of reinsurer and reinsured closely. When the reinsured denies coverage, and that denial is sustained in a declaratory judgment action, the reinsurer necessarily benefits from

that course of events. Where, however, the insured pays out a claim despite a clear lack of coverage, it does so at its "peril." New York State Marine Ins. Co. v. Protection Ins. Co., 18 F. Cas. 160, 160 (C.C.D. Mass. 1841) (Story, J.). As numerous decisions now hold, a reinsurer is not liable to the reinsured to the extent the latter pays out under a policy where coverage was precluded "as a matter of law." Hiscox v. Outhwaite, 1990 Folio No. 2491 (U.K. Commercial Ct. App. Nov. 3, 1991) (Ex. 1).[5]

For these reasons, reinsurer and reinsured have a mutual interest in reaching an expeditious and correct determination of coverage. Not surprisingly, therefore, the reinsurer typically is more than a passive observer in this process. Pursuant to the express terms of the reinsurance agreement as well as the duty of "utmost good

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[5] See also American Ins. Co. v. North American Co. for Property & Casualty Ins., 697 F.2d 79, 81 (2d Cir. 1982); State Auto. Mut. Ins. Co. v. American Re-insurance Co., 748 F. Supp. 556 (S.D. Ohio 1990); Reliance Ins. Co. v. General Reinsurance Co., 506 F. Supp. 1042, 1050 (E.D. Pa. 1980); Michigan Millers Mut. Ins. Co., 452 N.W.2d 841, 842-43 (Mich. Ct. App. 1990).

faith," the reinsured company must notify the reinsurer of any claim that may trigger the latter's indemnity obligation.[6] Moreover, the reinsurer specifically reserves the right to be "associated" with the reinsurer in the defense and control of any claim. As a practical matter, reinsurers often use this relationship to convey their views on the validity of the insured's demand for coverage and the proper response to it. When the demand is doubtful, reinsurers frequently encourage the reinsured company to resist it. That intimation can be explicit or it can be conveyed as a veiled suggestion that reimbursement might not be forthcoming if the reinsured company pays out on the claim.

Taken together -- this close relationship, the shared interest in correctly evaluating and, where appropriate, resisting demands for coverage, and the imbalance of assigning to the reinsured the risk of an incorrect coverage determination -- make the question presented here, in Justice

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[6] See, for example, Clause C in the Affiliated/Constitution Re contract.

Story's words, not "of any intrinsic difficulty." New York State Marine Ins. Co., 18 F. Cas. at 160. With complete unanimity, courts and commentators alike have concluded that the reinsurer is contractually obliged to bear its proportionate share of the legal costs associated with investigating and, where appropriate, resisting demands for coverage. Because the cost and expenses of coverage litigation are "incurred for the benefit or the reinsurers and are indispensable for the protection of the reinsured," any other conclusion would be so unreasonable as to be plainly beyond the intent and expectations of the parties. Id.[7]

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[7] All of the leading commentators and treatise writers have spoken with one voice on this issue. See 13A John L. Appleman & Jean Appleman, Insurance Law & Practice § 7700, at 566-67 (1976) (reinsured is contractually obliged to pay proportionate share of declaratory judgment costs); 19 George J. Couch, Couch on Insurance 2d § 80:68, at 675 (2d ed. 1983) (same); 44 Am. Jur. 2d Insurance § 1837, at 828 (1982) (same); Jonathan A. Bank et al., The Reinsurance of Environmental Claims: Shades of Grey, Mealey's Litig. Rep.: Reinsurance, Dec. 12, 1991, at 16, 29 (same). For a representative analysis, see Kenneth R. Thompson, Reinsurance 328-30 (4th ed. 1966):

(continued...)

The holding of this Court in Fanueil Hall Ins. Co. v. Liverpool & London Globe Ins. Co., 153 Mass. 63, 26 N.E. 244, 246 (1891), is illustrative, particularly in light of the technical (and incorrect, see infra pp. 23-26) arguments urged by Constitution Re on the basis of the policy language. In Fanueil Hall, as here, the Court construed a reinsurance contract that obligated the reinsurer to reimburse the reinsured for "all losses or damages arising under the[] [underlying] policies . . . subject to the same risks, conditions . . . as the policies reinsured." Id. at 66, 26 N.E. at 245. Rather than finding this language somehow limiting, the

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[7](...continued)
Since the reinsured is bound at his peril that the claim against him is valid, after he has given notice to the reinsurer, he is justified in submitting the claim to the decision of the court and the costs which necessarily arise in such a suit might be considered as incurred upon reasonable grounds, and are allowed as composing part of a claim for indemnity against the reinsurer.

See also Robert F. Salm, Reinsurance Contract Writing, in Strain, supra, at 105 (reinsured should be encouraged to incur as much legal expense as necessary in resisting a claim where circumstances dictate).

Court held that the contract obligated the reinsurer to pay the reinsured "not only for the amount of the original loss [and the insured's defense costs], but also for the costs and expenses incurred by the [reinsured] in defending itself against the [insured]." Id. at 68, 26 N.E. at 246 (emphasis added).[8] Other decisions reaching precisely this conclusion -- both in this country and in Great Britain -- are legion.[9]

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[8] The Superior Court therefore was simply wrong to brush aside this decision on the ground the pertinent policy language had not been presented or analyzed. Op. at 8-9.

[9] See Peerless Ins. Co. v. Inland Mut. Ins. Co., 251 F.2d 696, 701 (4th Cir. 1958); New York State Marine Ins. Co., 18 F. Cas. at 160; Central Nat'l Ins. Co. v. Devonshire Coverage Corp., 426 F. Supp. 7, 26 (D. Neb. 1976); Owens S.S. v. Aetna Ins. Co., 121 F. 882, 888-89 (S.D. Ga. 1903); Gantt v. American Central Ins. Co., 68 Mo. 503 (1878) (Ex. 2); Strong v. Phoenix Ins. Co., 62 Mo. 289, 295-98 (1876) (Ex. 3); Hastie v. De Peyster, 3 Cai. R. 190 (N.Y. 1805) (Ex. 4). For an especially instructive British case reaching the same conclusion, see Insurance Co. of Africa v. Scor (U.K.) Reinsurance Co., 1 Lloyd's Rep. 312, 325 (1985) (Ex. 5) (reinsured's right to reimbursement of coverage costs is an implicit term of the contract whether or not found in an explicit term of the agreement); see also British Dominions Gen. Ins. Co. v. Duder, 2 L.J.K.B. 394 (1915) (Ex. 6).

So uniform is the commentary and caselaw on this point that Constitution Re cannot reasonably suggest that it expected the pertinent contract language to have been interpreted any other way.[10] See Central Nat'l Ins. Co. v. Devonshire Coverage Co., 426 F. Supp. 7, 26 (D. Neb. 1976) (finding that coverage determination expenses were reimbursable, because "whether that 'standard practice' is one based on the express or implied terms of the contract," it was "within the

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[10] The only two cases relied on by Constitution Re do not even remotely support its position. The only question at issue in Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co., 903 F.2d 910 (2d Cir. 1990), was whether the reinsured company could recover defense costs in excess of the limits set out in the insurance agreement, i.e., the costs of defending the insured in the underlying litigation. Id. at 911-912, 914. Thus, the case did not even involve coverage litigation expenses. Nor, of course is the modest sum Affiliated is seeking from Constitution Re anywhere near the limits set out in the Certificate. McKeithen v. S.S. Frosta, 430 F. Supp. 899 (E.D. La. 1977), is equally inapposite, and indeed did not even concern reinsurance. The issue there was whether an insurer could recover from its insured the costs of bringing an interpleader action to resolve their respective rights and liabilities. Because the court answered that question solely with regard to the language of the insurer/insured policy, the case has no bearing whatever on the reinsurance question at issue here.

contemplation of the parties"); Insurance Co. of Africa v. Scor (U.K.) Reinsurance Co., 1 Lloyd's Rep. 312, 325 (1985) (Ex. 5). Indeed, in the experience of AIA member companies, reinsurers routinely pay their proportionate share of the expenses associated with coverage litigation. Thus, to the extent that "customs and traditions" of the business shed light on the meaning of the policy language, see supra pp. 10-12, they overwhelmingly cut against Constitution Re's already strained interpretation of the contract language.

So too do considerations of both elemental fairness and sound public policy. "It has long been held . . . that when a right to indemnity is conferred . . . the indemnitee may recover reasonable legal fees and costs in resisting a claim within the compass of the indemnity." Amoco Oil Co., Inc. v. Buckley Heating, Inc., 22 Mass. App. Ct. 973, 495 N.E.2d 875, 876 (1986). That general principle applies with particular force when the indemnity arises in the context of a reinsurance agreement. Any other conclusion

would allow the reinsurer to assume the position of a "free rider" -- to stand by idly while the reinsured company, on its own nickel, litigates a coverage defense for the reinsurer's benefit or, if the reinsured declines to litigate, to refuse to indemnify on the ground that the reinsured failed to resist coverage with sufficient vigor.

Moreover, an interpretation that forces reinsured companies to make this Hobson's choice would foment an adversarial relationship between reinsured and reinsurer directly at odds with the basic premise of the reinsurance transaction that their interests are aligned.[11] Unless the

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[11] See Great American Surplus Lines Ins. Co. v. Ace Oil Co., 120 F.R.D. 533, 538-39 (E.D. Ca. 1988) (recognizing the common interest and cooperation between the primary insurer and the reinsured); Vera Democrazia Soc'y v. Bankers' Nat'l Life Ins. Co., 10 N.J. Misc. 632, 633-34, 160 A. 767, 768-69 (1932) (noting that the reinsured and reinsurer must communicate freely and candidly to each other); Cecil E. Golding, The Law and Practice of Reinsurance 69 (5th ed. 1987) ("[T]he intention [of 'follow the fortunes' doctrine] is to set up a kind of community of interest in treaty matters, so that whatever fortune, good or bad, should befall the ceding company should be shared by the reinsurer and whatever the ceding company should decide to do in relation to any treaty matter should be equally binding on the reinsurer, even though it had not been consulted.").

reinsurer bears some responsibility for declaratory judgment expenses, it has no incentive to take anything other than a hard line on arguable demands for coverage. Specifically, it has every incentive to insist that the reinsured company resist coverage as vigorously as possible -- or risk a fight over reimbursement down the line. In contrast, the reinsured company often has an incentive simply to pay the claim (whether covered or not) rather than sustain the full expense of contesting coverage.

Thus, if Constitution Re's position were to prevail, these countervailing incentives would result in a de facto conflict of interest between reinsured and reinsurer. For the same reasons, sparing the reinsurer the costs of coverage litigation, while leaving it every incentive to insist on it, creates a powerful impetus to invoke scarce judicial resources to resolve coverage issues. Surely any such consequence is not in the public interest.

II. The Language of the Reinsurance Certificate Requires Constitution Re to Pay its Proportionate Share of the Costs of the Coverage Action.

These more general considerations find ample support in the express terms of the Reinsurance Certificate. Clause A provides that "[t]he liability of the Reinsurer shall follow that of the Company [Affiliated FM] and shall be subject in all respects to all of the terms and conditions of the Company policy [the Affiliated/Campbell Soup policy]." Relying on this provision, the trial court concluded that Affiliated is barred from recovering declaratory judgment expenses from the reinsurer because such expenses "would not be covered under the Affiliated/Campbell policy." Op. at 7. Stated differently, the trial court posited the following syllogism: (1) the reinsurer's obligations are coextensive with those of the reinsured company under its policy; (2) the reinsured company's investigation and declaratory judgment expenses are not covered under the Campbell Soup policy; and, therefore, (3) the

reinsurer has no obligation to reimburse the reinsured company for these expenses.

This reasoning is demonstrably incorrect, as any reading of the full Certificate readily confirms. By providing that the reinsurer's "liability" is "subject to" the "terms and conditions" of the Campbell Soup policy, Clause A merely articulates the basic indemnity relationship between the parties. That is, the reinsurer's obligations, being derivative, are "subject to" the same limitations on coverage set out in the underlying policy -- for example, the reinsurer cannot be called upon to indemnify the reinsured company if the latter pays an insured for property damage under a life insurance policy.[12]

It simply does not follow, however, that the underlying policy defines the entire universe of the reinsurer's duties to the reinsured. To the

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[12] Cf. American Ins. Co. v. North American Co. for Property & Casualty Ins., 697 F.2d 79, 81 (2d Cir. 1982); State Auto. Mut. Ins. Co. v. American Re-Insurance Co., 748 F. Supp. 556 (S.D. Ohio 1990); Employers Reinsurance Corp. v. American Fidelity & Casualty Co., 196 F. Supp. 553, 561 (W.D. Mo. 1959).

contrary, Clause D expressly states otherwise. Thus, Clause D provides that "in addition" to its obligation to indemnify Affiliated for losses associated with the underlying litigation, Constitution Re "shall pay its proportion of expenses . . . incurred by [Affiliated] in the investigation and settlement of claims." The intent of the phrase "in addition thereto" could not be plainer: The obligations set out in Clause D are supplemental to -- not limited by -- the more general provisions of Clause A.[13]

Any doubt about this construction is removed by the inclusion of "expenses incurred in the investigation" of claims among the obligations accepted by Constitution Re. That provision must refer to "expenses" entirely apart from any

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[13] Although the lower court cited to the preamble of the policy, quite appropriately it did not rely on it. The preamble provides that "in consideration of the payment of the premium and subject to terms, conditions, and limits of liability set forth herein . . . , the reinsurer does hereby reinsure the ceding company . . . in respect of the Companies' policies." As the underscored language shows, the "subject-to" language in the preamble references the reinsurance agreement rather than the underlying policy.

"terms" or "conditions" of the underlying Campbell Soup policy. Neither that policy -- nor any other of which AIA is aware -- assigns the insurer's coverage-determination expenses to the policyholder. Thus, as the introductory phrase again confirms, such expenses must be "in addition" to any obligations emanating directly from the underlying policy. Any other interpretation would render the provision for investigation expenses entirely superfluous.

Indeed, Constitution Re essentially concedes as much. Its standard practice is to reimburse its reinsureds for investigation expenses, including legal expenses, up to the point that they make the decision to deny coverage. If, however, Constitution Re has a recognized duty to pay some expenses beyond those arising directly under the Campbell Soup policy, then that policy does not define the entire set of its obligations. For this reason as well, the lower court's understanding of the interrelationship of Clauses A and D clause was plainly in error.

The only remaining question then is whether declaratory judgment expenses constitute "expenses (other than office expenses and payments to any salaried employee) incurred by the [reinsured] Company in the investigation and settlement of claims." For several reasons, that question should be answered in the affirmative. As an initial matter, the phrase in parentheses suggests an intent to cover all forms of expenses "other than" those specifically excepted. At the very least, that provision demonstrates that the parties to the agreement knew how to exclude certain forms of expenses when that was their intent. Their failure to exempt litigation expenses thus conveys an expectation that they would be included.

Moreover, drawing the line at pre-litigation expenses simply makes no sense. The line between hiring private counsel to render a coverage opinion and hiring them to defend a coverage action is blurry at best -- and certainly finds no support in the policy language, which references both "investigation and settlement" expenses.

Particularly in an era where contested commercial decisions frequently get resolved in a judicial forum, it is naive to draw the line in that fashion. Whether arising in the context of an on-site inspection, a pre-litigation analysis or an adjudication, all monies expended by the reinsured in a good faith effort to resolve the existence of coverage constitute "expenses incurred . . . in the investigation and settlement of claims."

Finally, the nature of the reinsurer/reinsured relationship -- as reflected in both industry practice and nearly two centuries of caselaw -- weigh decisively in favor of interpreting the language in that fashion. As explained in Part I, the structure, purpose, and practical operation of the reinsurance transaction all presuppose that the burdens of coverage litigation will be borne by reinsurer and reinsured alike.

For all of these reasons, the trial court's holding that declaratory judgment expenses are not reimbursable as a matter of law is unsupportable. To the extent the Court finds the phrase

"investigation and settlement expenses" to be less than entirely self-evident, at most this would justify development of a more complete record concerning industry practice and the parties' intent. While AIA believes such an approach to be unnecessary in light of both the clarity of the language and the structural backdrop against which it is set, a remand for these limited purposes is the only even theoretical alternative to outright reversal.

CONCLUSION

For the reasons set forth above, *amicus curiae* American Insurance Association respectfully requests this Court to reverse the decision below.

Respectfully submitted,

Rosanna Sattler
BBO No. 442760
Jeffrey W. Armstrong
BBO No. 547160
POSTERNAK, BLANKSTEIN & LUND
100 Charles River Place
Boston, MA 02114
(617) 367-9595

OF COUNSEL:

Thomas W. Brunner
Christopher D. Cerf
John C. Yang
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for *Amicus Curiae* American Insurance Association

February 25, 1993

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 1993, a true and correct copy of the foregoing Motion for Leave to File Brief of the American Insurance Association as Amicus Curiae in Support of Plaintiff-Appellant Affiliated FM Insurance Company was served by first-class U.S. mail, postage prepaid, upon the following persons:

Rosemary Connolly
ROBINS, KAPLAN, MILLER & CIRESI
P.O. Box 710 Back Bay Station
Boston, MA 02117-0710
(617) 267-2300
Attorney for Affiliated FM Insurance Company

Mitchell S. King
MORRISON, MAHONEY & MILLER
250 Summer Street
Boston, MA 02210
(617) 439-7500