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Control #: Unrecorded #8998431
Index #: E2020001359

Date:

Time:

Meissner, Wayne W.
Meissner, Jill G.

Ridge Construction Corporation
Certain Underwriters at Lloyd's London
Resolute Management, Inc.

Total Fees Paid: $0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

Wayne W. Meissner and
Jill G. Meissner, his Spouse

Plaintiffs,

v.

DECISION and ORDER
Index No.: E2020001359

Ridge Construction, Inc.,
Certain Underwriters at Lloyd's
London and Resolute Management, Inc.

Defendants.

Lipsitz, Ponterio and Comerford, LLC (John P. Comerford, Esq. and Anne E. Joynt, Esq. of counsel) and Duggan Pawlowski & Cooke LLP (James J. Duggan, Esq. of counsel) for the Plaintiffs

Mendes & Mount LLP (Eileen T. Mccabe, Esq., Jaimie H. Ginzberg, Esq. and Dylan E. Maag of counsel) and The Cook Group (Gary Casimir, Esq. and Armand Kalfayan, Esq. of counsel) for the Defendants Certain Underwriters at Lloyd's London and Resolute Management, Inc.

Hon. John J. Ark, J.S.C.[1]

PREAMBLE

A brief overview of this matter. Wayne Meissner was exposed to negligently applied materials containing asbestos in 1970-71 while employed by the Eastman Kodak Company. He now suffers grievously from advanced malignant mesothelioma. A jury awarded him and his wife Jill $8,000,000 against Ridge Construction, Inc. a subsidiary of Eastman Kodak Company. Ridge Construction, Inc. was dissolved in 1978. The defendant Certain Underwriters at Lloyd's, London issued excess insurance policies that covered Ridge Construction, Inc.'s liability for causing Wayne Meissner's cancer during the exposure period. The instant matter is pursuant to New York Insurance Law §3420 to collect the verdict from the excess insurance policies issued by Certain Underwriters at Lloyd's, London. The trial defense law firm neither moved against or

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[1] As the justice then assigned to the Seventh Judicial Asbestos Litigation, I presided at both the *Wayne W. Meissner, et ux. vs. Air & Liquid Systems Corp., et al., Index No.: E2018007953* jury trial in November, 2019 and the instant litigation *Wayne W. and Jill G. Meissner v. Ridge Construction Corporation, Certain Underwriters at Lloyd's London and Resolute Management, Inc. Index No. E2020001359 (here, Meissners v. Underwriters)* until I retired as a New York State Supreme Justice on December 31, 2020. I "unretired" June 15, 2021 and was reassigned the Meissner cases. Justice Erin P. Gall presided over *Meissners v. Underwriters* from January 1, 2021 until its reassignment to me after June 15, 2021.

appealed the jury verdict. The defendant Certain Underwriters at Lloyd's, London sent notice of disclaimer[2] but chose not to become involved in the trial defense. Consequentially, the jury verdict is both the facts and the law of the case.

Plaintiffs' contentions[3]

Husband Wayne and wife Jill Meissner (here, the Meissners or plaintiffs) seek to recover[4] from insurance policies issued by the defendant Certain Underwriters at Lloyd's, London (here, Underwriters or Lloyd's) in the early 1970s that allegedly cover an unsatisfied judgment arising from a November 15, 2019 liability and damages jury trial verdict of $8,000,000[5]. The damages were awarded against Ridge Construction, Inc. (here, Ridge Construction or Ridge), which is a former subsidiary of Eastman Kodak Co. (here, Eastman Kodak).[6] At the trial, the plaintiffs proved that, for a period of about thirteen months in 1970-1971, while he was employed by Eastman Kodak in Rochester, New York, Wayne Meissner was exposed to Ridge Construction's tortuous activities in using asbestos laden fireproofing materials, which caused Wayne Meissner's mesothelioma diagnosis in 2018. During the course of the underlying asbestos-related litigation, plaintiffs learned that Ridge Construction appeared to be insured for its liability in the early 1970s by excess liability insurance policies issued by Underwriters. These insurers, now direct defendants under the authority of New York Insurance Law §3420 (here, §3420), appear to have issued general liability policies that covered Ridge Construction's liability for causing

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[2]See, page 19 below, to wit: *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004) at 356.

[3]Plaintiffs' narrative is paraphrased from a letter sent to the Court, June 10, 2021 and filed June 10, 2021, ECF No. 188.

[4]As pointed out by plaintiffs' allocation expert, William Downs of Ankura Consulting, Inc., this is his first case in his 17 years of experience wherein an injured party seeks to recover directly from insurance policies issued by an insurance carrier that allegedly cover an unsatisfied judgment arising from a liability and damages jury trial verdict. All of his other analyses involved disputes among insureds and their carriers, among the carriers, or both.

[5]$5.5 million of this award was with respect to the claims of Wayne Meissner, and a total of $2.5 million of this award was with respect to the "loss of consortium" and "loss of services" claims of Jill Meissner. The $8,000,000 verdict was reduced to $6,440,007.98 on December 10, 2019. A judgment in the amount of $6,492,006.29 was signed and filed by the Monroe County Clerk on December 17, 2019.

[6] See, *Wayne W. Meissner, et ux. vs. Air & Liquid Systems Corp., et al.*. Seventh Judicial Asbestos Litigation, Monroe County Index No.: E2018007953.

Wayne Meissner's cancer during the exposure period in question. Lloyd's has vigorously disputed that its excess policies cover Ridge Construction's liability and has steadfastly refused to pay the still outstanding judgment.

Upon review of Eastman Kodak's insurance program during the early 1970s, coverage for the insured subsidiary Ridge Construction was provided by a series of primary, umbrella and excess policies issued by a number of insurers, including the defendants. The first-level umbrella policy issued by Underwriters sat directly above the primary insurer's retained limit of $1,000,000 issued by Lumbermens. Eastman Kodak also purchased and maintained several layers of excess insurance policies, which sat above the first-layer umbrella policy limits. The total limits of the three Underwriters' umbrella and excess policies at issue are $30,000,000.

Plaintiffs contend that the coverage for Ridge Construction, a named insured under Eastman Kodak's insurance program, was intended to work as follows: upon judgment being entered against Ridge Construction, and the primary Lumbermens' policy being previously exhausted by settlement with Eastman Kodak, the Meissners, as judgment creditors, could then look to the first Underwriters' umbrella layer to pay out its limits. Upon the exhaustion of the first layer of the Underwriters' policy, the Meissners would then look to the next layer of the coverage up to that layer's limits and so on all the way up the 1970-1971 tower until the judgment was paid in full.

Today, the value of the Meissners' judgment is over $7,500,000, all of which remains unpaid by the Lloyd's insurers, but still well "within the policy limits" of the $30,000,000 in total limits that the defendants' three umbrella/excess policies at issue in this litigation. The trial defense resulted in the very substantial jury verdict, after which, most remarkably, neither trial counsel for Ridge nor Underwriters took any legal action including no post trial motions or an appeal. Accordingly, the verdict is both the facts and the law of the case.

Defendants' contentions. [7]

As plaintiffs conceded in their complaint and in multiple briefs filed to date, their only

[7]Defendants' narrative is taken from a letter sent to the court, June 21, 2021 and filed June 21, 2021, ECF No. 189.

basis to assert standing to pursue this action against Underwriters is §3420. It is well settled under New York law that in the event of an unsatisfied judgment against a tortfeasor policyholder (or alleged policyholder), the Meissners, as judgment creditors, are entitled to pursue an action against the alleged insurers, Underwriters, of the judgment debtor policyholder Ridge Construction for insurance coverage capped at the amount of the unsatisfied judgment and subject to the applicable policy limits, terms and conditions. There is no presumption of entitlement to insurance coverage merely because a trial was held and a judgment was obtained in plaintiffs' prior action against Ridge Construction. This is not a tort case, but rather a contract-based dispute that Underwriters are entitled to defend as they would any coverage dispute with a policyholder or alleged policyholder with regard to a claim that is not covered under the terms and conditions of an insurance policy.

To that end, plaintiffs allege they are entitled to insurance coverage under three separate insurance policies: CX 1184, CX 1185 and CX 1186 (here, the "Policies"). The alleged Policies were severally subscribed in favor of Eastman Kodak, not Ridge Construction. Plaintiffs, however, assert that Ridge Construction is entitled to coverage under the Eastman Kodak policies as a former subsidiary of Eastman Kodak. Putting aside plaintiffs' burden to establish that Ridge Construction is in fact a named insured under the Policies, plaintiffs otherwise grossly misstate that "the total limits of the three Lloyd's umbrella and excess policies at issue were $30,000,000." To the contrary, the Policies are three separate insurance contracts each with their own policy limits and attachment points. The available policy documentation clearly sets forth Underwriters' several subscription share of each policy. For example, Underwriters' several subscription share of CX 1184 is 38.41% of $1 million, or $384,100. This is a contractual term that cannot be disputed or altered. The same is true for Underwriters' several subscription share set forth in CX 1185 (81.01%) and CX 1186 (65.43%). Furthermore, while plaintiffs correctly state that the Policies are umbrella or excess policies, they do not acknowledge each policy's respective attachment point. Based on the available documentation, CX 1184 sits in excess of at least $1 million of underlying coverage (potentially more); CX 1185 sits in excess of $ 2 million (potentially more); and CX 1186 sits in excess of $6 million (potentially more). In order to even potentially access each respective layer of coverage, it is plaintiffs' burden to show full and

proper exhaustion of each policy, starting at the primary layer underlying CX 1184. It is defendants' position that plaintiffs will be unable to establish full and proper exhaustion of any primary policy issued by Lumbermens, let alone full and proper exhaustion of each umbrella/excess policy.

Plaintiffs' assertion that a settlement agreement between Lumbermens and Eastman Kodak established full and proper exhaustion of any Lumbermens' policy, including the 1970-1971 Lumbermens' policy, is disputed. It is defendants' position that the referenced settlement agreement is insufficient as a matter of New York law to establish full and proper underlying exhaustion per the Policies' terms and conditions.

Even if plaintiffs were able to establish full and proper underlying exhaustion (which defendants believe they cannot), there are many other coverage issues that are the subject of this litigation which defendants firmly believe preclude and/or limit the coverage potentially available, including: whether plaintiffs can meet their burden to establish "injury" during the policy period; whether the $2.5 million portion of the judgment for "loss of consortium" and "loss of services" is covered (it is defendants' position that it is not as a matter of law); and allocation issues, among others. Perhaps most significantly, overarching all of these coverage disputes is whether plaintiffs are barred from seeking coverage at all as a matter of law based on late notice of the Meissners' claim.

PROCEDURE

Underwriters received correspondence from counsel for plaintiffs on December 17, 2019 which enclosed a copy of the "Order Directing Entry of Judgment" in the amount of $6,492,006.29[8] which was signed and filed by the Monroe County Clerk on December 17, 2019 and a copy of the Notice of Entry thereof. Thereafter, Underwriters received additional correspondence dated December 26, 2019 (and received on behalf of Underwriters on December 31, 2019) from counsel for plaintiffs which enclosed a Notice of Entry of Judgment, the Judgment and a Statement for Judgment and Bill of Costs. In correspondence dated January 16, 2020, counsel for Underwriters responded to the correspondence regarding the Judgment

[8]See footnote 5 above.

received from plaintiffs' counsel on December 17, 2019 and December 31, 2019, and again detailed their coverage position, specifically stating (among other things) as follows:

> Here, Mr. and Mrs. Meissner –standing in the shoes of Ridge (the alleged insured) under § 3420– bear the burden to prove entitlement to coverage under any alleged policies. As set forth in the Insurers' prior correspondence, Ridge would not be entitled to coverage to the extent various policy provisions, including those related to notice, have not been complied with. There also are a number of other coverage issues that may preclude coverage for this claim.
>
> For instance, and as set forth in more detail in the prior correspondence cited above: there is no coverage for this matter due to late notice of this claim. Moreover, no coverage is available under any alleged policy to the extent the bodily injury is not caused by an "occurrence." Further, no coverage is available under any alleged policy to the extent injury during the policy period is not established. Additionally, no coverage is available under any alleged policy to the extent full and proper underlying exhaustion is not established; and/or to the extent no amounts are allocable to the policies under the applicable New York law. We also note that your correspondence does not specify the amount sought from any specific insurer. Any potential obligation, if any, under any policy is limited to the applicable limits per the terms and conditions thereof and subject to the policy's attachment point. Moreover, as previously advised, Underwriters' payment obligations, if any, under any policy to which they subscribe are several and not joint. Underwriters' payment obligations, if any, are limited solely to the extent of their individual subscriptions and they are not responsible for the subscription of any co-subscribing insurer.

On February 4, 2020, plaintiffs filed a Complaint against Ridge Construction and Underwriters alleging entitlement to coverage under the "Policies". Plaintiffs allege that "Ridge Construction is a former subsidiary of Eastman Kodak, Inc." and that "Ridge Construction's only assets are the insurance policies that were issued when Ridge Construction, while performing construction work in Rochester, New York in 1970-1971, was a wholly owned subsidiary of Kodak." The complaint acknowledges that plaintiffs' standing to file the instant action is based solely upon § 3420.

On April 30, 2020, defendants filed a pre-answer Motion to Dismiss, whereby this court on July 23, 2020, granted defendants' motion in part (dismissing all of plaintiffs' claims for attorneys' fees, costs and "other damages"), and denied the motion in part (permitting plaintiffs' cause of action for declaratory judgment to proceed). Accordingly, on August 6, 2020, defendants filed their answer to the remaining allegations in the complaint asserting various

affirmative defenses related to this complex insurance coverage dispute and rooted in the policy's terms, conditions, and exclusions.

Underwriters have argued that plaintiffs had actual or constructive notice of several facts and circumstances that were explored and developed in discovery between January 2021 and present. Underwriters have requested that this court should strike previously undeveloped arguments arising out of plaintiffs' September 29, 2021 Renewed Motion for Summary Judgment, on the grounds that these arguments ought to have been made prior, based on the available discovery documents. Underwriters present no legal grounds for striking otherwise correct arguments not founded in post January 2020 discovery. Most important, however, is that all relevant facts and law are before the court when it makes any determination and that every party has had ample opportunity to respond to any proffered facts and legal arguments. In this case, such has occurred. Underwriters' request is therefore denied.

EXISTING MOTIONS and ISSUES

During the course of this litigation, the parties have each made multiple dispositive motions. The court has heard oral arguments and reviewed all the motions including many thousands of pages of attached documents, all of which have either been eFiled or received into evidence at several hearings. Counsel have also each submitted questions of their own choosing, answers and rebuttals to focus their positions for the court's consideration. Plaintiffs filed a Note of Issue and Statement of Readiness on December 21, 2021. Subsequent thereto, the court has heard the testimony of at least six witnesses, read scores of affirmations and hundreds of pages of sworn testimony. On May 23, 2022 the parties agreed that all outstanding motions were consolidated in a motion for directed verdict. On June 2, 2022, plaintiffs' counsel, from a review of the filings in this case, submitted what they believe is a complete and accurate list of the dueling motions for summary judgment that are pending:

- Motion No. 4, Doc. No. 96- Plaintiffs' Motion for Summary Judgment on Trigger of Coverage and Allocation and Striking Several Affirmative Defenses of Defendant Certain Underwriters at Lloyd's London (*filed September 25, 2020*)
- Motion No. 5, Doc. No. 144- Defendants Certain Underwriters at Lloyd's London's Cross Motion for Summary Judgment Based Upon Late Notice (*filed November 13, 2020*)

- Motion No. 6, Doc. No. 198- Renewal of the Plaintiffs' Motion for Summary Judgment for Insurance Company Direct Payment of the Plaintiffs' Entire Judgment Pursuant to Insurance Law 3420 or, in the Alternative, an Immediate Trial (*filed September 29, 2021*)
- Motion No. 7, Doc. No. 226- Defendants Certain Underwriters at Lloyd's, London's Renewed Notice of Cross Motion for Summary Judgment Based Upon Late Notice (*filed October 18, 2021*)
- Motion No. 8, Doc. No. 235- Defendants Certain Underwriters at Lloyd's, London's Motion for Summary Judgment on (1) Plaintiffs' Failure to Establish a Covered "Occurrence" With Respect to the Claims of Plaintiff Jill G. Meissner; (2) Plaintiffs' Failure to Establish Full and Proper Underlying Exhaustion; and (3) the Requisite Pro Rata Allocation Under the Excess Policies (*filed October 18, 2021*)

DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON'S MOTION FOR DIRECTED VERDICT.

On June 15, 2022, defendants Certain Underwriters at Lloyd's, London moved this court for an order granting a directed verdict in their favor pursuant to CPLR § 4401 dismissing all claims asserted by Plaintiffs Wayne W. Meissner and Jill G. Meissner on the following elements of their claims:

(1) that Plaintiffs provided timely notice to Underwriters of their claim, and, if not, that there was a valid excuse for their delay (being decided on the summary judgment record as per the procedure set by the court);

(2) that the claim of Mrs. Meissner is a covered "occurrence" under the Policies (being decided on the summary judgment record as per the procedure set by the court);

(3) that Mr. Meissner sustained injury-in-fact during the period of any of the Underwriters' policies at issue;

(4) that any purported injury sustained by Mr. Meissner was neither expected nor intended by Ridge Construction Corporation;

(5) that there was full and proper underlying exhaustion (plaintiffs' concession during recent proceedings that the limits of the 1970-1971 Lumbermens' primary policy have not been paid moots various aspects of the pending motions for summary judgment. However, any remaining legal issues with respect to underlying exhaustion are being decided on the summary judgment record as per the procedure set by the court); and

(6) that plaintiffs' claimed damages have been properly allocated (legal issues presented being decided on the summary judgment record as per the procedure set by the court).

Defendants Underwriters relied on their accompanying Memorandum of Law dated June 7, 2022 in Support of their Motion For Directed Verdict; Affirmation of Jaimie H. Ginzberg, Esq. in support thereof dated June 7, 2022 (with Exhibits A-J thereto); defendants' pending Motions for Summary Judgment; and all prior pleadings and proceedings heretofore had in this action.

As set forth in the accompanying papers, Underwriters have always maintained that the pending motions for summary judgment should be decided before any "trial" on any issue proceeded, and that Underwriters are entitled to a judgment as a matter of law based on the issues fully briefed in the long-pending motions for summary judgment. Defendants repeatedly objected to the presentation of any testimony prior to resolution of the pending Motions for Summary Judgment. However, over defendants' objections both prior to and during the proceedings, testimony was heard on limited issues on February 4 through February 5, 2022, February 10, 2022, May 4, 2022, May 6, 2022, May 12, 2022, May 13, 2022 and May 23, 2022. Each witness was subject to cross examination. As addressed in two oral applications for Directed Verdict in defendants' favor made on the record on May 6, 2022 and May 23, 2022 respectively, and as directed by this court, defendants incorporate fully by reference the arguments set forth in their several pending Motions for Summary Judgment. Defendants further move for a directed verdict in their favor dismissing plaintiffs' claims in their entirety based on the recent testimony and plaintiffs' failure to meet their burden of proof on the issues of (1) injury-in-fact during the policy period; and (2) that the Lumbermens' primary policy has been properly allocated to in order to establish full and properly underlying exhaustion. Accordingly, Underwriters requested that a directed verdict in their favor, dismissing plaintiffs' claims in their entirety, be entered.

In their accompanying Memorandum of Law, Underwriters set forth, as follow, their arguments which will be addressed by the court in this Decision.

I. PLAINTIFFS HAVE FAILED TO PROVE THAT THEY PROVIDED TIMELY NOTICE TO UNDERWRITERS OF THEIR CLAIM, AND, IF NOT, THAT THERE

WAS A VALID EXCUSE FOR THEIR DELAY.[9]

II. PLAINTIFFS HAVE FAILED TO PROVE THAT THE CLAIM OF MRS. MEISSNER IS A COVERED "OCCURRENCE" UNDER THE POLICIES.[10]

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO PROVE MR. MEISSNER SUSTAINED AN "INJURY-IN-FACT" DURING THE PERIOD OF UNDERWRITERS' POLICIES.

IV. PLAINTIFFS HAVE PROVIDED NO EVIDENCE THAT ANY PURPORTED INJURY SUSTAINED BY MR. MEISSNER WAS NEITHER EXPECTED NOR INTENDED BY RIDGE CONSTRUCTION CORPORATION.

V. PLAINTIFFS HAVE FAILED TO PROVE THAT THERE WAS FULL AND

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[9]With regard to the issue of late notice, Defendants incorporate as if fully set forth herein the following currently pending Motions and documents in support thereof: Defendants' Cross Motion for Summary Judgment Based Upon Late Notice dated November 13, 2020 (NYSCEF Doc. No 144); Memorandum of Law in Support of Defendants' Cross Motion for Summary Judgment Based Upon Late Notice dated November 13, 2020 (NYSCEF Doc. No. 145); and Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' Cross Motion for Summary Judgment Based Upon Late Notice dated November 13, 2021 (NYSCEF Doc. No. 146) (referred to herein in as "Ginzberg Cross Motion Aff.") and Exhibits A-M thereto (NYSCEF Doc. Nos. 147-159); and Defendants' Renewed Notice of Cross Motion for Summary Judgment Based Upon Late Notice dated October 18, 2021 (NYSCEF Doc. No. 226); and Supplemental Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' Renewed Cross Motion for Summary Judgment Based Upon Late Notice October 18, 2021 (NYSCEF Doc. No 227) (referred to herein as "Ginzberg Supp. Cross Motion Aff.") and Exhibits A-G thereto (NYSCEF Doc. Nos. 28-234).

Defendants likewise refer to and incorporate their oral application for Directed Verdict set forth on the record on May 6, 2022.

[10]Regarding the claim of Mrs. Meissner, Defendants incorporate as if fully set forth herein the following currently pending Motions and documents in support thereof: Defendants' Memorandum of Law in Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. No. 117); and Affirmations of Jaimie H. Ginzberg, Esq. in Support of Defendants' Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. Nos. 118, 119) and Exhibits 1-24 (NYSCEF Doc. Nos. 120-143). Defendants' Motion for Summary Judgment dated October 18, 2021 (NYSCEFD oc. No. 235); Memorandum of Law in Support of Defendants' October 2021 Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 236); Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' October 2021Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 237) and Exhibits 1-37 thereto (NYSCEF Doc. Nos. 238-274); and Defendants' Reply Memorandum of Law in Further Support of Defendants' October 2021 Motion for Summary Judgment dated December 8, 2021 (NYSCEF Doc. No. 315); and Reply Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. No. 316) and Exhibits 1-2 (NYSCEF Doc. Nos. 317,318).

Defendants likewise refer to and incorporate their oral application for Directed Verdict set forth on the record on May 6, 2022.

PROPER UNDERLYING EXHAUSTION.[11]

VI. PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR CLAIMED DAMAGES HAVE BEEN PROPERLY ALLOCATED TO THE EXCESS POLICIES.[12]

VII. PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR PROFFERED "ALL SUMS" ALLOCATION APPROPRIATELY ACCOUNTS FOR CONTRIBUTION FROM THE POLICYHOLDER UNDER NEW YORK LAW.

DECISION

I. PLAINTIFFS HAVE FAILED TO PROVE THAT THEY PROVIDED TIMELY NOTICE TO UNDERWRITERS OF THEIR CLAIM, AND, IF NOT, THAT THERE WAS A VALID EXCUSE FOR THEIR DELAY.

In correspondence dated May 29, 2019, Underwriters were notified by plaintiffs for the first time in any capacity, by any individual or entity, of the matter captioned *Wayne W.*

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[11] As an initial matter, with respect to the issue of full and proper underlying exhaustion, Defendants incorporate as if fully set forth herein the following currently pending Motions and documents in support thereof: Defendants' Memorandum of Law in Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. No. 117); and Affirmations of Jaimie H. Ginzberg, Esq. in Support of Defendants' Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. Nos. 118, 119) and Exhibits 1-24 (NYSCEF Doc. Nos. 120-143). Defendants' Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 235); Memorandum of Law in Support of Defendants' October 2021Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 236); Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' October 2021 Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 237) and Exhibits 1-37 thereto (NYSCEF Doc. Nos. 238-274); andDefendants' Reply Memorandum of Law in Further Support of Defendants' October 2021 Motion for Summary Judgment dated December 8, 2021 (NYSCEF Doc. No. 315); and Reply Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. No. 316) and Exhibits 1-2 (NYSCEF Doc. Nos. 317, 318).

[12] As to the issue of the appropriate allocation methodology to be employed to the excess policies if they are ever reached (which they are not), Defendants incorporate as if fully set forth herein the following currently pending Motions and documents in support thereof: Defendants' Memorandum of Law in Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. No. 117); and Affirmations of Jaimie H. Ginzberg, Esq. in Support of Defendants' Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. Nos. 118, 119) and Exhibits 1-24 (NYSCEF Doc. Nos. 120-143). Defendants' Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 235); Memorandum of Law in Support of Defendants' October 2021Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 236); Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' October 2021 Motion for Summary Judgment dated October 18, 2021 (NYSCEF Doc. No. 237) and Exhibits 1-37 thereto (NYSCEF Doc. Nos. 238-274); and Defendants' Reply Memorandum of Law in Further Support of Defendants'October 2021 Motion for Summary Judgment dated December 8, 2021 (NYSCEF Doc. No. 315); and Reply Affirmation of Jaimie H. Ginzberg, Esq. in Support of Defendants' Opposition to Plaintiffs' September 2020 Motion for Summary Judgment (NYSCEF Doc. No. 316) and Exhibits 1-2 (NYSCEF Doc. Nos. 317, 318).

Defendants likewise refer to and incorporate their oral application for Directed Verdict set forth on the record on May 6, 2022 and May 23, 2022.

Meissner, et ux. vs. Air & Liquid Systems Corp., et al., Seventh Judicial Asbestos Litigation, Monroe County Index No.: E2018006953. In the May 29 letter, plaintiffs asserted:

> "Mr. Meissner has advanced malignant mesothelioma which was caused, in part, from his exposure to asbestos-containing W.R. Grace MonoKote-3 which was negligently applied by Ridge Construction Corporation at Kodak Park in Rochester, NY. Ridge is now a dissolved corporation."

Plaintiffs further asserted that the years of Mr. Meissner's exposure were 1969-1977 and that "the excess carriers during 1969-1972 was Lloyd's [sic] under policy numbers CX 1184, CX 1185 and CX 1186..."

Underwriters take the position that this notice was "late", by asserting that they were entitled to receive notice by March 22, 2019, the date that plaintiffs' counsel received copies of "the Policies" in discovery. The gist of Underwriters' argument is that the Meissners had a duty to place Underwriters on notice of the potential claim against their excess policies.[13] The Meissners did, in fact, provide Underwriters with notice[14] on May 29, 2019, but the defendants contend that they had an obligation to do so 68 days earlier than they did. According to Underwriters' argument, the breach of this extra-statutory duty is fatal to the Meissners' case.

Plaintiffs counter with five arguments:

1. Plaintiffs contend that Underwriters is incorrect - that plaintiffs, such as the Meissners, have a right to notify an excess insurer of potential claims against it in order to protect their potential right to bring a subrogated claim under Insurance Law § 3420, but they do not have an obligation to do so.

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[13]The contractual provisions regarding notice to Underwriters require the insured's insurance manager (not an injured party) to proceed as follows:

> F. NOTICE OF OCCURRENCE: -
> Whenever the Insurance manager of the Assured has information from which he may reasonably conclude that an occurrence covered hereunder involves injuries or damage which, in the event that the Assured shall be held liable, is likely to involve this Policy, notice shall be sent as stated in item 3 of the Declarations as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy, but which at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims. See, NYSCEF Doc. No. 100 at pg. 5.

[14]Further, "[n]otice requirements are to be liberally construed in favor of the insured, with substantial, rather than strict, compliance being adequate" (Greenburgh Eleven Union Free Sch. Dist. v. National Union Fire Ins. Co. of Pittsburgh, PA, 304 A.D.2d 334, 335–336, 758 N.Y.S.2d 291).

Plaintiffs maintain that defendants conflate having "an independent right to give notice of the accident to satisfy the notice requirement of the policy" under § 3420(a)(3) with having an obligation to do so. Plaintiffs' counsel claim to have searched the case law interpreting § 3420 as it applies to notice of claim given by an injured party to the insurer and have been unable to find any reported case where the courts have upheld a disclaimer based solely on the grounds that the injured party failed to provide the insurer with notice under the terms of the policy. Defendants disagree, pointing to *Mu Yan Lin v. Burlington Ins. Co.*, 2012 WL 967633 (S.D.N.Y., Mar. 21, 2012) for the proposition that "injured parties' late notice to the insurer in actions brought pursuant to § 3420 was deemed case dispositive" (See, NYSCEF Doc. No. 284 at pg. 30, footnote 4). However, in *Mu Yan Lin,* the court granted summary judgment to the insurer not on the failure to provide notice of the occurrence, but rather failure of notice of the ensuing lawsuit. Defendant's reliance on *Mu Yan Lin* is unavailing in that in *Mu Yan Lin* the notice of the lawsuit by the injured party, which the court deemed untimely, was first given to the insurer after a judgment was obtained against the insured tortfeasor several years later.

2. Underwriters' argument attempts to read an extra-statutory obligation on the part of plaintiffs to provide notice before they have stepped into the shoes of the insured. There is no basis in either the insurance contract or the caselaw to justify the assertion that the plaintiffs had a duty to inform Underwriters of the potential claim against it, much less a duty arising on March 22, 2019. See, plaintiffs' prior Memoranda of Law of November 20, 2020 (NYSCEF Doc. No. 182) and November 22, 2021 (NYSCEF Doc. No. 277).

The plaintiffs have a right to inform a carrier, including an excess carrier, of a potential claim. This right is not to be conflated with the duty of the insured. There is no basis in the statutes or caselaw to argue that failure to provide such notice constitutes a waiver of plaintiffs' right to recover damages under the applicable excess insurance contract. Indeed, the contract in question specifies that "failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy, but which at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims" (See, NYSCEF Doc 100). The Meissners further contend that the notice that Underwriters received complied with the notice provision of the insurance contract that they are seeking to enforce by this action.

3. Underwriters was notified of the claim via letter from plaintiffs' counsel John Comerford, Esq. on May 29, 2019 immediately after he was told by trial counsel for Ridge Construction, Meghan DiPasquale, that she had not placed the excess insurers on notice. Mr. Comerford was surprised to learn that this had not been done by counsel for Ridge Construction, and so, "in an abundance of caution", did so himself. See, NYSCEF Doc. No. 161 at pg. 52. It was not only "reasonably possible" for Ridge Construction's counsel to provide timely notice to the excess insurers, it was reasonably anticipated by counsel for the injured plaintiff that they would do so. Mr. Comerford recounted that the first indication he was given that counsel for Ridge Construction had not put the excess carriers on notice was at the meeting on May 24, 2019, where he conversed with counsel for Ridge Construction:

> "hey, you guys might want to consider putting the excess carriers on notice. And that caught me by surprise because Ward Greenberg had represented Ridge Construction and similar entities for over 30 years. And I said, well, I assume you guys did that. You represent Ridge. Not us. And Kevin and/or Meghan- I don't know who exact- I think it was Meghan said that she's sure Kodak may have done that, but didn't have any details of it. I said fine, but it can't hurt to put them on notice, so I'm going to do it." See, NYSCEF Doc. No. 161 at pgs. 51-52.

Assuming, *arguendo,* there is merit to Underwriters' contention, Underwriters has not refuted the assertion of plaintiffs' counsel nor called him as a witness that he had a good faith belief that such notice to Underwriters had been received from an attorney for the insured.

4. Plaintiffs' counsel claims that up to that point in the litigation he had no reason to believe that the Meissner claim would necessarily implicate the excess carriers.[15] He has provided two Affirmations establishing that, based on the facts and circumstances of the case (including plaintiff's age, diagnosis, particular exposures and pool of potentially liable defendants), he did not have a reasonable belief that the policies were likely to be triggered until no earlier than May 24, 2019 and that he promptly notified the Underwriters at that time (See, NYSCEF Doc. Nos. 108 and 160).

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[15]Counsel's evaluation of the claim was discussed in detail in the Attorney Affirmation in Opposition to Defendant Certain Underwriters at Lloyd's London's Cross-Motion for Summary Judgment, and in Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment dated November 20, 2020 (See, NYSCEF Doc. No. 160).

5. Underwriters received notification of the Meissner claim from at least two sources. As discussed at length in the November 6, 2020 deposition testimony of John Comerford, Esq, counsel for the plaintiffs, Underwriters was notified of the claim via letter from him on May 29, 2019. See, NYSCEF Doc. No. 110. Upon first learning on May 21, 2019 that Ridge had not notified Underwriters, the Meissners, through counsel, notified Underwriters on May 25, 2019. Underwriters disclaimed coverage to the plaintiffs, but not to Ridge, in June 2019, but took no legal action until February 4, 2020, when plaintiffs filed the complaint in the instant lawsuit. James M. Gardner of Resolute Management Inc., a third-party administrator for certain claims on behalf of Underwriters (including this claim at the time), promptly responded to the May 29, 2019 correspondence in a letter dated June 27, 2019. Ginzberg Opp. Aff. ¶ 15; NYSCEF Doc. No. 202. In the June 27, 2019 correspondence, plaintiffs were advised from the very outset that "to the extent the plaintiffs in this action ultimately seek coverage from [Underwriters] under the Policies for a judgment or settlement, the plaintiffs will stand in the shoes of the insured as far as coverage rights and obligations." Ginzberg Opp. Aff. ¶ 16; NYSCEF Doc. No. 202. Plaintiffs were also advised that Underwriters were conducting a policy search, including for the "alleged policies referenced in the [May 29, 2019] letter." Underwriters further set forth in detail their position that notice of the underlying Meissner action was late and that there was no proof of underlying exhaustion, among other things.

In this case, Underwriters' notices of disclaimer at issue, sent on June 27, 2019 and August 7, 2019, were sent only to the injured party, never to the insured. Despite the content of the disclaimers sent by James M. Gardner of Resolute Management Inc., the fact that they were never shared with the insured, Eastman Kodak, and that no disclaimer was ever made to Eastman Kodak or Ridge Construction, would render them ineffective. See, *Webster v. Mount Vernon Fire Ins. Co.*, 368 Fed.3d 209 (2d Cir., 2004).

Underwriters go on to argue, in a footnote, that counsel's May 29, 2019 correspondence (NYSCEF Doc. No. 110) to their defense counsel and agent, Mendes & Mount, did not place them on notice on the grounds that the policy provide that Notice of Occurrence should be provided to Lukis Stewart Price Forces [sic] & Co. Ltd. (NYSCEF Doc. No. 284, at pg. 47, footnote 1.) According to the Canadian federal government's corporate register, the

Montreal-based firm of Lukis, Stewart, Price and Forbes & Co., Ltd., changed its name to Lukis, Stewart, Sedgwick, Forbes, Inc. in 1978 and changed its name to Sedgwick Group, Canada, Inc. in 1983, before being discontinued in December, 1985. By providing notice to Mendes & Mount, who is designated as the party to receive service of process in the policy, Mr. Comerford made certain that Underwriters received actual notice of the potential claim. Underwriters assert that they can issue a binding disclaimer through Mendes & Mount while, at the same time, remaining constructively uninformed of the potential claim against the policy.

Underwriters' disclaimers cannot establish that they were entitled to earlier notice from either the plaintiffs or the insured. Failure to provide the insured and the injured person with timely notice, in compliance with the statute, renders the insured's failure to provide timely notice irrelevant. See, *Crowningshield v. Nationwide Mutual Insurance Company,* 255 A.D.2d 813 (1st Dept, 1998); *Shell v. Fireman's Fund Ins. Co.*, 17 A.D.3d 444 (2nd Dept, 2005) ("The lack of timeliness of the disclaimer renders academic any consideration of the validity of the grounds asserted therein including the staleness of notice furnished by the insured or by the injured party.")

Underwriters concede that the only written notice of the disclaimer was issued to the Meissner plaintiffs. They did not provide notice to either Eastman Kodak (the named insured) or Ridge Construction (the dissolved defendant covered by the policies). Underwriters attempt to evade the effects of this deficiency through two arguments: First, they argue that: "[C]ounsel for Ridge was in fact made aware of defendant's disclaimer almost immediately after the initial June 27, 2019 disclaimer was sent," when plaintiffs' counsel copied Ridge Construction's counsel on an e-mail exchange regarding Underwriters' disclaimer. However, they cite no law indicating that the written notice requirement is obviated when the insured's counsel becomes aware of the claims through other means. Second, they assert that Ridge Construction was dissolved at the time of the litigation. However, they cite no law indicating that a defendant's dissolution renders the written notice provision optional.

Underwriters had the ability to disclaim to Eastman Kodak, the insured policyholder, at any time. On July 9, 2019, Eastman Kodak provided Underwriters with notice of Wayne Meissner's pending action against Ridge Construction, its case number, and its jurisdiction in an

e-mail beginning, "Dear Insurer." The communication was unambiguously intended to provide notice, stating: "We are providing notice under the policies referenced on the attached Policy Schedule and any other policies that may be applicable but are not otherwise identified" (See, NYSCEF Doc. No. 204). The email chain in the record indicates that the communication was forwarded to a claims manager named Alexander Sage with a request that he "confirm that the attached correspondence are pertains [sic] to your Eastman Kodak Company/London/[Redacted in original] and that you will take the necessary steps to respond to the extent that it requires a response," to which Mr. Sage replied, "Confirmed" (See, NYSCEF Doc. No. 204). The email to Mr. Sage was copied to an address called "claimreporting@resolutemgt.com." (Id.)

In Underwriters' November 22, 2021 Memorandum of Law, they argue that this notice should be ignored, on the grounds that, according to Underwriters' corporate designee, Mr. Sage, "...was responsible for handling claims involving Eastman Kodak Company other than the - Ridge Construction Claim" (See, NYSCEF Doc. No. 284, at 38). However, Underwriters' internal administrative arrangements are of no consequence to the question of whether they received timely notice from the insured. Failures of communication between an insurer and its agent or broker do not justify failure to issue a written disclaimer. *Tex Dev. Co., LLC v. Greenwich Ins. Co.*, 51 A.D.3d 775 (2nd Dept, 2008).

The record indicates that Underwriters received notice from Eastman Kodak, their insured to whom they did not issue a written disclaimer as is required by the statute. As such, for purposes of this action, plaintiffs' notice is presumptively timely.

If plaintiffs' notice was untimely, Underwriters only challenged (disclaimed) the notice sent by the Meissners and not any notice from their insured. Underwriters, in turn, had an express, statutory duty to provide written notice of any disclaimer "to the insured and the injured person or any other claimant," pursuant to Insurance Law § 3420(d)(2). Underwriters did not provide either Eastman Kodak or Ridge Construction with any such written disclaimer notice. According to the controlling caselaw, this divests Underwriters of the ability to raise a valid late notice defense.

Underwriters argue contrariwise that, under the circumstances of this case- where the insured entity is dissolved and its counsel has constructive notice of the action- the duty to issue

written notice of disclaimer to the insured should be deemed to be optional. Plaintiffs contend that this argument contradicts the plain wording of the statute[16] and is not supported by any caselaw.

Underwriters further argue that, the last several years of litigation notwithstanding, they still have not been noticed to their satisfaction. Plaintiffs' notice was tendered to Underwriters' attorneys, who assert that it should, instead, have been tendered to a Canadian broker who originally sold the policy, despite the fact that this broker became defunct approximately forty years ago. Underwriters then argue that the notice tendered on behalf of Eastman Kodak, the policy holder, is a nullity because it was not tendered in the name of Ridge Construction, Eastman Kodak's dissolved subsidiary. Underwriters further assert that notice sent to, and acknowledged by, Underwriters' third-party claims administrator, is invalid because they maintain that the Resolute employee responsible for servicing Eastman Kodak claims is not assigned to service claims against Ridge Construction.[17] Again, plaintiffs contend that Underwriters may not feign constructive ignorance of claims they are in the process of actively litigating by appealing to their internal administrative arrangements.

CONCLUSION AS TO NOTICE.

Interestingly, Underwriters requests leniency ("the duty to issue written notice of disclaimer to the insured should be deemed to be optional") for its purported failure to properly notify its insured of its disclaimer, as required by a statute (§ 3420 [a] [3]), but rigor for any tardiness in the plaintiffs' notification to Underwriters of their claim. Underwriters' decision whether to pursue and perfect actual notice of disclaimer to the insured under the peculiar

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[16]Ins. Law § 3420(d) provides:
"If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

[17]The Meissner case was complicated by Ridge Construction being a dissolved corporation and that Eastman Kodak had gone through a highly publicized bankruptcy. Eastman Kodak was the entity that purchased the program of insurance. It did so to cover its risk, as well as that of its wholly owned subsidiary, Ridge Construction. Here, the excess carriers are trying to shift the focus onto Ridge Construction, essentially a dissolved, inactive, formerly wholly-owned subsidiary of Eastman Kodak. Eastman Kodak took an appropriate measure to put the excess carriers on notice via the July 9, 2019 email from their broker, Marsh, with all information contained in it. There was never a disclaimer addressed to Eastman Kodak or Ridge Construction.

circumstances of this case was a reasonable litigation judgment. Similarly, plaintiffs' counsel's initial reliance on Ridge's trial counsel to notice excess insurance carriers as well as his evolved determination that excess carriers may be implicated were reasonable litigation judgments. Comparatively, Underwriters' "no notice" may be more egregious than plaintiffs' "late notice".

Certainly, upon learning in February 2019 of the possible excess insurance coverage, it would have been most prudent for the Meissners to have promptly notified Underwriters, although not required had Ridge Construction done so.[18] However, it was reasonable under the circumstances[19] for the Meissners to believe that Ridge Construction, which was vigorously opposing the Meissner claim, had notified Underwriters as required by Ins. Law § 3420 [a] [3]. As well, although subjective, Mr. Comerford's explanations for not notifying Underwriters for 68 days are sufficiently plausible, reasonable and credible to explain a purported unreasonable delay, which was done as soon as practible.

Although it is questionable whether the Meissners' notice to Underwriters was timely, which this court believes it was, there was actual notice, which after receiving, Underwriters chose to not become involved in the defense of the plaintiffs' lawsuit against Ridge Construction. Underwriters could have brought a declaratory judgment action to clarify its obligations, if any, as counseled[20] by the Court of Appeals in *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350 (2004) at 356:

> "Finally, we note that an insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the

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[18]See, *Carlson v. Am. Int'l Grp., Inc.*, 199 A.D.3d 1363, 158 N.Y.S.3d 465, 467 (4th Dept. Nov. 12, 2021): "As the injured party, plaintiff has the right to bring an action against defendants to collect on the judgment (see Insurance Law § 3420 [a] [2]) and an independent right to provide notice to the insurer (see § 3420 [a] [3]; ...Although plaintiff also failed to give timely notice of the occurrence to National Union, '[i]t is only in the event of noncompliance by both the insured and the injured claimant that the insurer may validly disclaim against the injured party'.... Here, inasmuch as DHL gave notice of the accident to National Union, which it does not contend was untimely, plaintiff was not required to give notice of the accident to National Union before seeking to collect on the judgment pursuant to section 3420 (a) (2)."

[19]*Children's Hosp. of Buffalo v. Emps. Reinsurance Corp.*, 84 A.D.2d 933(4th Dept.1981) "The injured party's notice to the insurance company is measured less rigidly, but must nonetheless be reasonable under the circumstances."

[20]Clearly, Underwriters could have followed the advice of the New York Court of Appeals in *Lang*. However, *Lang's* advice was just that, advice.

> duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law § 3420. Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment."

Not only have plaintiffs proven that they provided timely notice to underwriters of their claim, but if not, there were valid excuses for their delay. Any motions to the contrary are denied.

II. PLAINTIFFS HAVE FAILED TO PROVE THAT THE CLAIM OF MRS. MEISSNER IS A COVERED "OCCURRENCE" UNDER THE POLICIES.

The defendants posit that the plaintiffs have not met their burden to prove a covered "occurrence" during the policy period with respect to their claims based on the Policies which define occurrence as:

> The term "Occurrence", whenever used herein, shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly or unintentionally results in personal injury, property damage... during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

In *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 646–56, (1993), the New York Court of Appeals addressed language, similar to that in the Policies, in a policy before that Court:

> "The policies require CNA to pay on behalf of the insured all damages for bodily injury, property damage, personal injury or employer's malpractice liability "caused by or arising out of an occurrence happening during the policy period." "Occurrence" is defined as "an accident or a happening or event or a continued or repeated exposure to conditions which unexpectedly and unintentionally results during the policy period in Bodily Injury,... or Personal Injury.... 'Bodily Injury' is defined as 'bodily injury, mental injury, mental anguish, shock, sickness, disease or disability, including death resulting therefrom sustained by any person.'...
> The insurance industry changed to occurrence-based coverage in 1966 to make clear that gradually occurring losses would be covered so long as they were not intentional. Thus, "occurrence" was defined to include "continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury... neither expected or intended from the standpoint of the insured."...
> CNA argues that the underlying complaints allege no "occurrences" covered by the CNA policies, that it therefore has no indemnity liability and thus no duty to defend. This

> argument has two parts. First, CNA contends, the asbestos contamination alleged in the underlying suits was not "unexpected or unintentional." Second, if there were occurrences, by Rapid's own practical construction, they were not within the CNA policy periods. We disagree with both contentions and conclude the underlying complaints allege covered occurrences that trigger CNA's duty to defend."

The duty to defend "is a much broader duty than the duty to indemnify ... [T]he duty to indemnify does not turn on the pleadings but rather on whether the loss as established by the facts is covered by the policy[; t]he duty to defend is decided solely on the allegations in the complaint which must be accepted by a court as true" (*Continental Casualty Co. v. Employers Insurance Company of Wausau ("Keasbey")*, 60 A.D.3d 128, 142, [1st Dept 2008], lv den 13 N.Y.3d 710 [2009], citing *Atlantic Mutual Insurance Co. v. Terk Tech. Corp.*, 309 A.D.2d 22, 28, [1st Dept 2003]).

Regardless, the Meissners have established a covered "occurrence" during the policy period with respect to their claims based on the Policies. Any motions to the contrary are denied.

The consortium claim.

As to Mrs. Meissner's consortium claim, in *Consorti v. Owens-Corning Fiberglas Corp.*, 86 N.Y.2d 449, 454 (1995), the Court of Appeals reasoned:

> "Thus, through succeeding generations of Judges composing this Court, over some 60 years, the Schmidt rule fixing the occurrence of tortious injury as the date when the toxic substance invades or is introduced into the body, has been reconsidered and reaffirmed, despite importunings that adoption of a medical date-of-injury standard would achieve more just results. Nothing has been presented here to warrant departure from Schmidt and the resultant destabilizing of what is now a settled, certain principle of New York tort law. It follows that, as a matter of law, Mr. Consorti's tortious injury occurred when he was exposed to and inhaled asbestos during the 1960s, before his marriage, and that Mrs. Consorti has no viable loss of consortium claim."

Applying *Consorti* to the instant matter, Mr. Meissner was exposed to and inhaled asbestos in 1970 and 1971 while assigned to Building 82, which he left in December, 1971. The Meissners married each other on July 10, 1971,[21] thereby obviating the issue of not being married when Mr. Meissner was exposed to and inhaled asbestos. The trial jury determined both that

[21]Testified to by the Meissners on February 10, 2022.

"Ridge Construction Corporation's application of fireproofing [was] a substantial factor causing plaintiff Wayne Meissner's malignant mesothelioma."[22] and that Jill Meissner has experienced past and future[23] loss of consortium as a result of Wayne Meissner's illness. Ultimate Net Loss provisions of the Policies provide coverage for derivative claims, which includes Jill Meissner's claim for loss of consortium. Both Wayne and Jill Meissners' claims are covered occurrences under the Policies. Any motions to the contrary are denied.

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO PROVE MR. MEISSNER SUSTAINED AN "INJURY-IN-FACT" DURING THE PERIOD OF UNDERWRITERS' POLICIES.

Insurance Law § 3420 authorizes any person who has obtained a judgment against an insured for damages for injury sustained during the life of an insurance policy to maintain an action against the insurer to recover the amount of the judgment in accordance with the terms of that policy. Insurance Law § 3420 does not limit claims to injuries discovered during the life of the policy.

Plaintiffs argue that as set forth in *Continental Cas. Co. v. Rapid-Am Corp.*, 80 NY2d 640 (1993),[24] and *Carrier Corporation v. Allstate Ins. Co.*, 187 A.D.3d 1616 (4th Dept, 2020), "personal injury" for asbestos claims begins at exposure (inhalation) and continues thereafter until the date of claim or death. Plaintiffs request that this court should hold that the same principles apply to Underwriters and grant plaintiffs' motion for summary judgment as a fully covered event.

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[22] Jury question 3.

[23] Jury Questions 8 and 9.

[24] As stated in *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 650 51, (1993):
"Decisions on when coverage is triggered for asbestos-related injury generally may be divided into four categories: (1) on exposure to asbestos (see, e.g., *Commercial Union Ins. Co. v Sepco Corp.*, 765 F2d 1543 [11th Cir]); (2) on manifestation of disease (see, e.g., *Eagle-Picher Indus. v Liberty Mut. Ins. Co.*, 682 F2d 12 [1st Cir], cert denied 460 US 1028); (3) on onset of disease, whether discovered or not ("injury-in-fact") (see, e.g., *American Home Prods. Corp. v Liberty Mut. Ins. Co.*, 565 F Supp 1485 [SD NY], mod 748 F2d 760 [2d Cir]); and (4) all of the above--in other words, a "continuous trigger" *(Keene Corp. v Insurance Co.*, 667 F2d 1034 [DC Cir], cert denied sub nom. *Liberty Mut. Ins. Co. v Keene Corp.*, 455 US 1007)."

The crux of defendants' objections goes to the distinction between the accrual of plaintiffs' underlying personal injury action and the accrual of plaintiffs' cause of action pursuant to Insurance Law § 3420(a).

Underwriters argue that *Continental Casualty Co. v. Employers of Wausau ("Keasbey")*, requires the plaintiffs to establish exactly when the injury overwhelmed Mr. Meissner's bodily defenses in order to trigger the Policies' coverage. The plaintiffs must show that the bodily injury occurs at a point at which "asbestos fibers overwhelm the body's defenses." Id. at 149. However, "*Keasbey*" was case specific and did not abrogate New York's case-by-case approach in determining when injury-in-fact triggers coverage for asbestos-related bodily injury.

New York law has determined that insurance coverage for latent diseases caused by asbestos is triggered by an injury-in- fact, which can be measured from the time of first exposure through manifestation of disease. Decisions on when coverage is triggered for asbestos-related injury generally may be divided into four categories: (1) on exposure to asbestos; (2) on manifestation of disease; (3) on onset of disease, whether discovered or not ("injury-in-fact"); and (4) all of the above--in other words, a "continuous trigger". The coverage trigger issue under the injury-in-fact test presents a question of fact which was heard and determined "yse" by the Meissner jury in November 2019, to wit: "Was Ridge Construction Corporation's application of fireproofing a substantial factor causing plaintiff Wayne Meissner's malignant mesothelioma?"[25] This unanimous jury determination was never challenged either post verdict or on appeal by either Ridge or Underwriters.

Pursuant to *Carrier Corp. v. Allstate Ins. Co.*, 187 A.D.3d 1616 (4th Dept, 2020), plaintiffs presented corroborating testimony of Drs. Brody and Utell on the factual issue of when the injury-in-fact occurred. Dr. Brody is a cellular biologist and an expert in the fields of anatomic pathology, lung and chest pathology, human physiology, microscopy and electron microscopy. Dr. Utell is a pulmonologist and a board certified occupational medical physician. Both are leading figures in their fields.

Drs. Brody and Utell both offered expert opinions indicating that asbestos exposure

[25]Jury Question 3.

causes cellular damage. Dr. Brody addressed the cellular biology implications of the toxic exposure and Dr. Utell testified as to the matter from the perspective of a pulmonologist, with particular reference to the consensus of the American Thoracic Society as represented in its diagnostic criteria. Not only did Drs. Brody and Utell corroborate the jury determination, but also Underwriters' expert on the pathogenesis of asbestos diseases, Brent L. Finley, PhD., although not saying to what degree, agreed[26] that "Ridge Construction Corporation's application of fireproofing [was] a... factor causing plaintiff Wayne Meissner's malignant mesothelioma."

Defendants are bound by the factual findings in the state court[27] personal injury actions that Mr. Meissner sustained injury from exposure to Ridge's use of materials containing asbestos between 1970 and 1971. Thus, even though plaintiffs' personal injury claims did not accrue until discovery of injury from asbestos exposure, plaintiff had sustained an injury as contemplated by Insurance Law § 3420 during the life of the relevant insurance policies. As a result, plaintiffs are entitled to recover their judgments from the excess insurers in accordance with the terms of the policies. The court grants his (their) motion for summary judgment as a fully covered event. Any motions to the contrary, including the motions[28] to preclude the testimony of Drs. Brody and Utell, are denied.

IV. PLAINTIFFS HAVE PROVIDED NO EVIDENCE THAT ANY PURPORTED INJURY SUSTAINED BY MR. MEISSNER WAS NEITHER EXPECTED NOR INTENDED BY RIDGE CONSTRUCTION CORPORATION.

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[26]During examination by the court at a hearing on May 13, 2022.

[27]In the recent Insurance Law § 3420 rulings in *Mineweaser v. One Beacon Ins. Co.*, No. 4-CV-0585A(SR), 2018 WL 7079526, at *22–24 (W.D.N.Y. May 30, 2018), report and recommendation adopted, No.14-CV-0585A(SR), 2021 WL 5149736 (W.D.N.Y. Nov. 5, 2021), the Federal Magistrate Judge found, and the District Court agreed, that the defendant excess insurers cannot seek to contest factual issues and medical causation resolved at trial in New York State Supreme Court, including the state trial court's determination that asbestos exposure many years before diagnosis triggers the occurrence-based coverage (citing, *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350(2004)).

[28]Motions to Preclude Dr. Arnold Brody (Doc. No. 384, letter application of February 2, 2022; Doc. No. 395, renewed by letter on May 3, 2022) and to Preclude Dr. Mark Utell (Doc. No. 384, letter application of February 2, 2022; Doc. No. 395, renewed by letter on May 3, 2022).

Defendants' posit that the evidence demonstrates that plaintiffs are unable to meet their burden to establish a covered "occurrence" during the policy period with respect to the claims of Mr. and Mrs. Meissner. In accordance with both the policy language and New York law, plaintiffs have not and cannot establish "injury-in -fact" during the policy period. Even if plaintiffs were able to establish "injury" during the policy period, which they are not, plaintiffs are unable to meet their burden to establish that exposure to asbestos from Ridge unexpectedly and unintentionally resulted in such injury during the policy period. Indeed, plaintiffs expressly argued -and the jury agreed–that Ridge's "actions, which caused plaintiff Wayne Meissner's injuries" were "taken with reckless disregard for the safety of others." To reach this conclusion, the jury was instructed[29] by the court that "a company acts with reckless disregard for the safety of others when it intentionally does an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." This is what Ridge was held liable for and it cannot be a covered "occurrence" as Mr. Meissner's "injury" has explicitly been found to be the result of *intentional* acts by Ridge. There is simply no basis upon which plaintiffs can argue that any "injury" during the policy period was unexpected and unintended, and coverage is barred as a matter of law.

Plaintiffs' rebut that Underwriters' question incorrectly conflates the concept of recklessness with that of intentionality. The underlying trial sounded in negligence, rather than intentional tort. (*See,* JuryVerdict Sheet, NYSCEF Doc. No. 2.). "Resulting damage can be unintended even though the act leading to the damage was intentional. A person may engage in

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[29]In the underlying trial, the court charged the jury on "reckless disregard" in relevant part as follows:

> Reckless disregard is not the same thing as negligence. Negligence is failing to exercise reasonable care under the circumstance. On the other hand, a company acts with reckless disregard for the safety of others when it intentionally does an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow. The act must have been done with conscious indifference to the outcome.

behavior that involves a calculated risk without expecting that an accident will occur - in fact, people often seek insurance for just such circumstances." *Continental Cas. Co.* v. *Rapid-American Corp.*, 80 N.Y.2d 640 (1993).

However, conscious indifference to the outcome is less than intentional. Underwriters conflates an intentional act which results in unintentional injury with an act which intentionally causes injury.

As above, the term "Occurrence", means an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury...liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence. Clearly, Ridge Construction's use of materials containing asbestos was intentional. However, the resulting damage, i.e. injury to Mr. Meissner, was unintended. Any motions to the contrary are denied.

V. PLAINTIFFS HAVE FAILED TO PROVE THAT THERE WAS FULL AND PROPER UNDERLYING EXHAUSTION.

Plaintiffs acknowledge that the Policies attach upon actual payment of the $1,000,000 Lumbermans primary policy and that the only evidence of "actual payment" is Lumbermans 2005 buy-back settlement agreement with Eastman Kodak. Accordingly, the plaintiffs have granted Underwriters a credit for the full amount of the primary policy so as to trigger Underwriters excess policy payment obligations. Underwriters rejects this offer. However, if Ridge was financially viable, it would be responsible "to fill the gap" in coverage for the $1,000,000 Lumbermans default. Since Mr. Meissner now "stands in the shoes" of Ridge, he has taken responsibility for Ridge's obligation by granting the $1,000,000 credit against the Policies, thereby "filling the gap" equivalent to full underlying exhaustion and activating Underwriters' and the judgment payment obligations. Any motions to the contrary are denied.

VI. PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR CLAIMED DAMAGES HAVE BEEN PROPERLY ALLOCATED TO THE EXCESS POLICIES; and

VII. PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR PROFFERED "ALL SUMS" ALLOCATION APPROPRIATELY ACCOUNTS FOR CONTRIBUTION FROM THE POLICYHOLDER UNDER NEW YORK LAW.

Two primary methods of allocation are used by the courts to apportion liability across multiple insurance policy periods for long tail claims (i.e. for personal injuries due to gradual or continuing exposure to toxic substances such as asbestos): all sums and proration. See, *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 31 N.Y.3d 51, 58 (2018). Underwriters argue that damages should be allocated pro rata by time over all applicable policy years, defined from date of exposure through date of diagnosis (in Mr. Meissner's case 48 years:1970-2018). Ordinarily, pro rata shares are "calculated based on an insurer's 'time on the risk', a fractional amount corresponding to the duration of the coverage provided by each insurer in relation to the total loss." Id. For pro rata allocation, "each insurance policy is allocated a 'pro rata' share of the total loss representing the portion of the loss that occurred during the policy period." Id., quoting *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 256 (2016).

Plaintiffs seek to recover "long-tail" claims per the all sums method, which is also known as joint and several allocation. The all sums method permits the insured to collect its total liability under any policy in effect during the period that the damage occurred, up to the policy limits. *Viking Pump*, 27 N.Y.3d at 255 The policies in *Viking Pump* contained non-cumulation clauses and non-cumulation and prior insurance provisions. 27 N.Y.3d at 258. Recognizing that non-cumulation clauses "prevent stacking, the situation in which an insured who has suffered a long term or continuous loss which has triggered coverage across more than one policy period ... wishes to add together the maximum limits of all consecutive policies that have been in place during the period of the loss," the New York Court of Appeals found such provisions cannot be reconciled with pro rata allocation. Id. at 259-61. The Court explained at 261:

> "Pro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the 'during the policy period' limitation, despite the fact that the injuries may not actually be capable of being confined to specific time periods. The non-cumulation clause negates that premise by presupposing that two policies may be called upon to indemnify the insured for the same loss or occurrence."

Where excess policies contain prior insurance and non cumulation provisions, as do the Policies in the instant case, vertical exhaustion is appropriate. *Viking Pump*, 27 N.Y.3d at 267.

This court, after hearing argument by counsel for the parties and consideration of the briefs and the record submitted and having heard the testimony of the respective allocation experts and making inquiry of them, determines that:

1. There are two primary methods of allocation used by the courts to apportion liability across multiple insurance policy periods for long tail claims: all sums and proration. *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, 31 N.Y.3d 51, 58 (2018).

2. The all sums method, which is also known as joint and several allocation, permits the insured to collect its total liability under any policy in effect during the period that the damage occurred, up to the policy limits. *Viking Pump*, 27 N.Y.3d at 255.

3. All sums allocation is required under each of these excess insurance policies. Therefore, having exhausted the underlying policy for any year in which plaintiff suffered an injury in fact, plaintiff would be permitted to enforce the judgment against any excess policy that provided coverage excess to the underlying policy, up to the policy limit for that year, and then pursue successive layers of excess insurance for that year until the judgment is satisfied. See, *Olin Corporation v. Lamorak InsuranceCompany*, 864 F. 3d 130 (2nd Circuit, 2017) ("an insured may pursue full recovery from any insurer in its program whose policy covers the relevant loss and contains a prior insurance and non cumulation provision irrespective of whether the insurer's policy was issued at the beginning, in the middle, or towards the end of the continuing occurrence").

4. Vertical exhaustion is conceptually consistent with an all sums allocation, permitting the insured to seek coverage through the layers of insurance available for a specific year; all sums allocation is appropriate in policies containing such provisions, like the ones at issue here.

THE ALLOCATION REPORTS.

The Meissners and Underwriters each presented the testimony and reports of experts in insurance allocation. Defendants' expert John Goldwater of Alan Gray, LLC. ran allocation scenarios under three methodologies. Because of the prior insurance and non cumulation provisions in the Policies at issue, the first two scenarios involving pro-rata allocations are

inapplicable and unavailing in this case. The third scenario , although denominated "All Sums" was essentially a pro-rata time-on-the-risk allocation methodology which is also inapplicable and unavailing in this case. Mr. Goldwater's allocations resulted in minimal or no payment to the plaintiffs.

Plaintiffs' expert William Downs of Ankura Consulting, Inc. used an "All Sums" allocation methodology in his report. The court adopts both Mr. Downs' methodology and calculations as follows:

1. All verdict/settlement dollars awarded to Mr. Meissner are allocated to the 01/1/1970-01/1/1971 policy year.

2. Between 01/1/1970 and 01/1/1971, Ridge Construction has primary and excess insurance coverage from Lumberman's and Underwriters' at Lloyds, as depicted in Table 1[30] on page 31. The Underwriters' at Lloyds policies depicted in this chart involve quota share policies where Lloyds is responsible for the listed percentage of the policy limits.

3. $1 Million of the $6,441,192.98 verdict/settlement[31] is assigned to the 01/1/1970 - 01/1/1971 Lumberman's OZL 655 000 primary policy.

4. $1 Million of the $6,441,192.98 verdict/settlement is assigned to the 03/1 /1969 - 03/1/1972 Underwriters' at Lloyds excess layer 1 policy CX1184. The $1 Million assigned to this policy is split 38.41 % to Lloyds and 61.59% to Other Entities.

5. $4 Million of the $6,441,192.98 verdict/settlement is assigned to the 03/1/1969 - 03/1/1972 Underwriters' at Lloyds excess layer 2 policy CX1185. The $4 Million assigned to this policy is split 81.01% to Lloyds and 18.99% to Other Entities.

6. $441,192.98 of the $6,441,192.98 verdict/settlement is assigned to the 03/1/1969 - 03/1/1972 Underwriters' at Lloyds excess layer 3 policy CX1186. The $441,192.98 assigned to this policy is split 65.43% to Lloyds and 34.57% to Other Entities.

7. In Table 2, also on page 31, Mr. Downs shows the amount allocated to each policy and the portion allocated to the Lloyds subscriber share of the Underwriters' at Lloyds policies.

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[30] The information shown in this chart was provided in Ridge Construction Corporation's Responses to Plaintiffs' First Set of Interrogatories.

[31] See footnote 5 above.

8. Mr. Downs use of the "all sums" allocation appropriately accounted for contribution from the policyholder under New York law and determined that $3,913,172.57 of the $6,441,192.38 verdict/settlement is allocated to Lloyds quota share limits. Mr. Downs then determined that interest accrued at a rate of 9% per year, or $964.89 per day[32] beginning on November 15, 2019 through July 15, 2022, the date of this Order (972 days), including $937,873.08 interest.

WHEREFORE, this court grants the plaintiffs Wayne and Jill Meissner a Judgment in their favor against the Certain Underwriters at Lloyd's, London as follows:

(1) On the First Cause of Action, an award of damages against Certain Underwriters at Lloyd's, London in the amount of $3,913,172.57 of the judgment against Ridge Construction, Inc. plus $937,873.08 interest through the date of this Decision and Order and costs.

(2) On the Second Cause of Action, an Order declaring that Certain Underwriters at Lloyd's, London is liable to pay directly to the plaintiffs the outstanding judgment in the amount of $3,913,172.57 plus $937,873.08 interest through the date of this Decision and Order and costs.

(3) Defendants' Motions as set forth above that are inconsistent with this Decision are denied.

ORDERED, that pursuant to CPLR § 2220(a) the requirement for filing the papers upon which this Order is based is hereby waived.

This Memorandum Decision constitutes the Order of this court. Petitioners may submit a judgment on notice to respondents.

Dated: July 18, 2022
Rochester, New York

John J. Ark, J.S.C.

[32] $3,913,172.57 allocated to Lloyds at 9% annual interest/365=$964.89 daily interest; 972 days will have elapsed between November 15, 2019 and July 15, 2022.

Table 1
Ridge Construction Coverage Chart

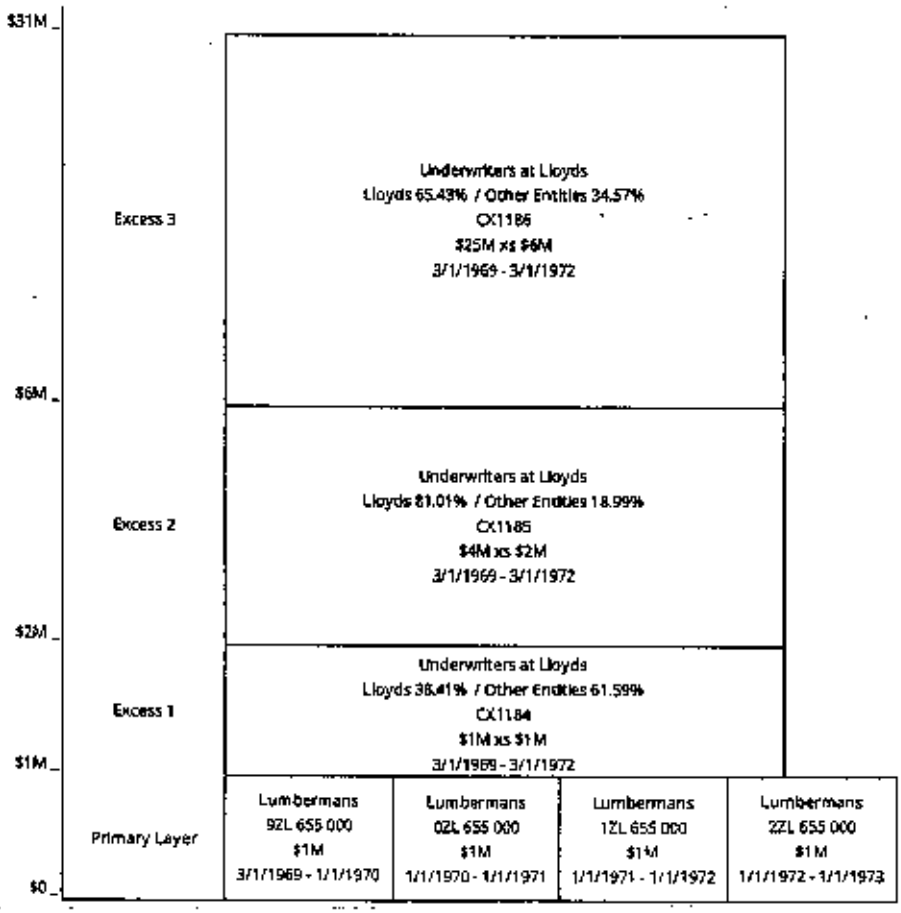

Table 2
Amounts Allocated to Lloyds

Policy	Policy Number	Start Date	End Date	Layer	Subscriber Share	Policy Limits	Total Allocated
Lumbermans	0ZL 655 000	1/1/1970	1/1/1971	Primary	N/A	$1,000,000.00	$1,000,000.00
Underwriters' at Lloyds	CX1184	3/1/1969	3/1/1972	Excess 1	Lloyds - 38.41%	$384,100.00	$384,100.00
					Other Entities - 61.59%	$615,900.00	$615,900.00
					Underwriters' at Lloyds CX1184 Total	**$1,000,000.00**	**$1,000,000.00**
Underwriters' at Lloyds	CX1185	3/1/1969	3/1/1972	Excess 2	Lloyds - 81.01%	$3,240,400.00	$3,240,400.00
					Other Entities - 18.99%	$759,600.00	$759,600.00
					Underwriters' at Lloyds CX1185 Total	**$4,000,000.00**	**$4,000,000.00**
Underwriters' at Lloyds	CX1186	3/1/1969	3/1/1972	Excess 3	Lloyds - 65.43%	$16,357,500.00	$288,672.57
					Other Entities - 34.57%	$8,642,500.00	$152,520.41
					Underwriters' at Lloyds CX1186 Total	**$25,000,000.00**	**$441,192.98**
					Grand Total	**$31,000,000.00**	**$6,441,192.98**
					Lloyds Subtotal	**$19,982,000.00**	**$3,913,172.57**
					Lloyds Per Diem Interest Amount ($3,913,172.57 x 9% / 365 Days)		$964.89
					Days Elapsed Since Verdict (11/15/2019 - 2/3/2022)		812
					Lloyds Total Interest Incurred		$783,492.20
					Lloyds Total Allocated Plus Interest as of 1/3/2022		**$4,696,664.77**