THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2008-HICIL-39**
Proof of Claim Number:	**INSU700645-01; INSU275296** **INSU700638; INSU700640** **INSU700641; INSU700642** **INSU700655; INSU700657** **INSU700658; INSU700659** **INSU700660; INSU700662**
Claimant Name:	**Sheldon Holson and Melvin Holson**
Insured or Reinsured Name:	**Holson Company**

LIQUIDATOR'S SECTION 15 SUBMISSION

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), makes this submission in support of the Liquidator's determination of the claim of Sheldon Holson and Melvin Holson (the "Holsons") pursuant to § 15 of the Revised and Restated Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation. In accordance with the March 7, 2009 Scheduling Order, the Liquidator addresses only coverage issues.

Introduction

The Liquidator's determination of the Holson's claim should be sustained. Home had no duty to defend for two independent reasons. First, the Holsons have not satisfied their burden of showing that the allegations of the KVL complaint bring the claim within the "sudden and accidental" exception to the pollution exclusion, which requires that there be allegations of rapid or otherwise abrupt discharges. The Connecticut Supreme Court has expressly rejected the Holsons' argument that the burden rests on the insurer to show that the allegations of the

complaint exclude sudden and accidental discharges. Second, the Home policies can have no obligation to defend pollution claims like the KVL case because the policies provide only excess coverage above the scheduled underlying insurance. The Endorsement 2 on which the Holsons rely does not apply because the pollution exclusion endorsement provides that coverage for pollution claims will be no broader than that provided by the underlying policies. Those policies have not been exhausted by payment as required to trigger Home excess coverage for defense expenses. Neither the refusal of primary insurers to defend nor the settlements with primary insurers for partial defense costs satisfies the exhaustion requirement. Finally, the Home excess policies had no duty to indemnify for the KVL settlement because of the pollution exclusion, the court's finding that the Holsons made fraudulent misrepresentations to procure the sale to KVL, and the allocation of the settlement amount across the many years of primary coverage.

A. Issues to be determined:

1. Have the Holsons met their burden of demonstrating that the allegations of the KVL complaint affirmatively bring the claim within the "sudden and accidental" exception to the pollution exclusion as required to obtain a defense under Schilberg Integrated Metals Corp. v. Continental Cas. Co., 819 A.2d 773 (Conn. 2003)?

2. Where the pollution exclusion expressly provides that Home's coverage for pollution claims shall not be broader than coverage provided by the underlying policies, do the Home excess policies have a duty to defend pollution claims as claims "not covered" by the underlying policies?

3. Did the primary insurers' refusal to defend obligate Home to pay the costs of defense where the Home excess policies include defense costs within ultimate net loss and provide that liability can only attach after payment of the underlying limits?

4. Did the Holsons' settlements with the primary insurers for amounts to defray defense costs trigger liability for past or future defense costs under the Home policies, where Home's policies provide that liability can attach only after payment of the underlying limits and require that the primary policies be maintained in full force and effect?

5. Do the Home policies provide any indemnity coverage in light of the pollution exclusion, the KVL court's finding of fraudulent misrepresentation, and the requirement that the primary policies be exhausted by payment?

B. Exhibits:

The Liquidator relies upon the following exhibits (cited as "Liq. Ex."):

1. The Home excess policies (available documentation)
2. Claimants' Mandatory Disclosures (without exhibits)
3. Claimants' counsel's letter dated May 10, 2001
4. Claimants' counsel's letter dated January 5, 1995
5. Travelers' letter dated March 28, 2001
6. Fireman's Fund settlement dated July 19, 1999 (to be filed subject to Liquidator's assented-to motion to file exhibit under seal)
7. Claimants' counsel's letter dated October 4, 2005
8. Claimants' counsel's letters September 27, 1999 and October 5, 1999
9. Memorandum Opinion in KVL Action dated August 3, 2000
10. Attachment 3 from Claimants' proof of claim
11. Liquidator's notice of determination
12. Home letter to Holson's broker dated August 5, 1980

C. Background

1. Facts

Home issued seven Manuscript Excess Liability Policies to the Holson Company ("Holson") in effect from 1973 to 1981 providing limits ranging from $3 million to $5 million excess of scheduled primary policies issued by Federal Insurance Company ("Federal") with limits of $50,000 from 1973-1976 and by Fireman's Fund Insurance Company ("Fireman's Fund") or Travelers Indemnity Company ("Travelers") with limits of $100,000 from 1976 through 1981. The available Home excess policy documentation is included in Liquidator's Exhibit ("Liq. Ex.") 1 and the policies are discussed in the following section.

The Holsons were the primary shareholders, directors and principal officers of Holson for over thirty years until 1986. Liq. Ex. 2 at 1.

In 1968, Holson acquired a site in Wilton, Connecticut (the "Wilton site"). Holson operated a photograph album manufacturing facility on the Wilton site for a twenty-two year

period from 1966 to 1988. Liq. Ex. 3 at 2. The Wilton site was sold to KVL Corporation ("KVL") in the late 1980s.

On February 1, 1991, KVL filed an action against Holson and the Holsons in the United States District Court for the District of Connecticut seeking damages relating to contamination at the Wilton site. K.V.L. Corp. v. The Holson Co., et al., C.A. No. 5:91CV59 (D. Conn.) (the "KVL Action"). The complaint in the KVL Action is Exhibit A to the Holsons' brief.

In February, 1991, Holson notified its insurers of the KVL Action. The insurers declined to defend. See Liq. Ex. 4.

The KVL Action was tried in the Connecticut federal court in 1995. Liq. Ex. 2 at 2.

Holson later brought a declaratory judgment action against the primary insurers seeking coverage and defense for the KVL Action. Holsons Br. at 3. In 1999, while the KVL Action remained pending, Holson entered settlements with Fireman's Fund and Travelers.

The May 1999 settlement with Travelers is confidential and its amount is unknown. According to a letter from Travelers, the parties to the settlement "agreed" that the two CGL policies issued by Travelers for the 1979-80 and 1980-81 periods were "deemed to be exhausted." Liq. Ex. 5; see also Liq. Ex. 7. The August 1999 settlement with Fireman's Fund "bought back" Fireman's Fund's policies. It will be filed as Liquidator's Exhibit 6 upon a ruling on the Liquidator's motion to file exhibit under seal. The Holsons advised Home of the fact of the Fireman's Fund settlement and asserted that it exhausted the primary policies by letters dated September 27, 1999 and October 5, 1999. Liq. Ex. 8. See Liq. Ex. 7.

The settlements between the Holsons and the primary insurers did not involve KVL or resolve the KVL Action. None of the settlement amounts were paid to KVL or used to satisfy or

extinguish KVL's liability claims. Liq. Ex. 3 at 3. The payments were used "solely" to defray a portion of the defense costs in the KVL Action. Id. See Holsons Br. at 13.

On August 3, 2000, the court in the KVL Action issued a decision against the Holsons on certain claims, including a finding that the Holsons "made fraudulent misrepresentations as alleged by KVL." Liq. Ex. 9 at CF 168. On April 25, 2001, the court entered a partial judgment holding them liable for an amount in excess of $2,000,000. Liq. Ex. 2 at 3.

In September 2002, the Holsons reached a settlement with KVL that resolved the KVL Action for a payment by the Holsons of $612,500. See Liq. Ex. 2 at 3, Liq. Ex. 10.

The Holsons' proof of claim appears to seek $612,500 for the KVL settlement, $25,000 in future monitoring/remediation expenses and $1,109,260.72 in defense expenses less the proceeds from the Fireman's Fund and Travelers settlements. Liq. Ex. 10; see Liq. Ex. 2 at 4. Holsons also seek "compensatory" damages, but such damages would not be a Class II claim under RSA 402-C:44.

The Liquidator issued a notice of determination denying the claim on July 28, 2008. Liq. Ex. 11. The Holsons filed their objection on September 25, 2008.

2. The Home Insurance Policies

Provisions of the Home excess policies make clear that the Liquidator was correct in determining that there is no coverage for the Holsons' claim.

a. The schedule of underlying insurance. The Home policies provide coverage above scheduled underlying policies as set forth in the declarations. The 1973-1976 Home policy schedule provides it is excess of a Federal Insurance Company CGL policy with a $50,000 property damage limit (Liq. Ex. 1 at CF44); the 1976-1980 Home policies' schedules provide they are excess of Fireman's Fund CGL policies with $100,000 limits (id. at CF49, 57,

66, 76, 87); and the 1980-1981 Home policy schedule provides it is excess of a Travelers CGL policy with a $100,000 limit (id. at CF95). See also Holsons Br., Ex. B (indicating slightly different underlying policies actually issued). The schedules of underlying policies show that the Home policies are "true" excess policies, intended to be excess by their very terms, and not primary policies coincidentally made excess by the application of "other insurance" provisions.[1]

b. Underlying limits and loss payable. The form Manuscript Excess Liability Policy applicable to all the Home policies contains a "Limit of Liability" provision that specifies that Home "shall only be liable for the ultimate net loss the excess of either (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances; or (b) [$10,000[2]] ultimate net loss in respect of each occurrence not covered by underlying insurances, (hereinafter called the 'underlying limits')." Liq. Ex. 1 at CF41. Liability under the policies does not attach until these underlying limits have been paid. The "Loss Payable" clause of Condition J provides:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Insured shall make a definite claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and The Company. If any subsequent payments shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy. [Liq. Ex. 1 at CF43 (emphasis added)]

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[1] Excess coverage "is generally available at a lesser cost than the primary policy since the risk of loss is less than for the primary insurer and there may be lesser duties such as with respect to the duty to defend." 1 E. Holmes, Appleman on Insurance 2d § 2.16 at 323 (1996). See 23 E. Holmes, Appleman on Insurance 2d § 145.4[B] at 32 (interim ed. 2003) ("Overall, it is the primary insurer's duty to assume all defense costs. A true excess insurer is specifically intended to come into play only when the limits of underlying primary coverage are exhausted.") (footnotes omitted).

[2] The $10,000 amount was set in endorsements to the policies. Liq. Ex. 1 at CF45, 53, 58, 67, 77, 88, 96.

c. Pollution exclusion. The Home policies contain by endorsement a pollution exclusion that excludes coverage for pollution claims unless they arise from a "sudden and accidental" release. The endorsement also provides that pollution coverage under the policies is no broader than that provided by the scheduled underlying policies. The endorsement states:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden and accidental.
>
> It is further understood and agreed that in no event shall coverage provided by this policy for Contamination or Pollution be broader than that provided by the Underlying Insurances set forth in the Schedule of Underlying Insurances. [Liq. Ex. 1 at CF46, 55, 62, 70, 80, 91 (emphasis added)][3]

d. Ultimate net loss and defense. The Home policies define "Ultimate Net Loss" as amounts that the insured or its insurer become liable to pay as well as defense costs, which are thus included within the policy limits. Specifically, the policies define "Ultimate Net Loss" as:

> [T]he total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses, and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees. [Liq. Ex. 1 at CF41 (emphasis added)]

The definition of "Ultimate Net Loss" also specifically excludes defense expenses that are included in other insurance, such as the underlying primary insurance. The definition continues:

[3] The available policy documentation in the possession of the Liquidator for the Home policy No. HEC9909110 for the 1980-1981 policy period does not include this endorsement. However, as stated on its declarations page (Liq. Ex. 1 at CF94), that policy was expressly a renewal of the 1979-80 Home policy No. HEC9831605 which, like all the other preceding Home excess policies, included the contamination and pollution endorsement (id. at CF91). Indeed, the Home underwriter's letter dated August 5, 1980 responding to the broker's renewal submission states that the renewal is subject to "[s]ame terms and conditions as expiring." Liq. Ex. 12. Accordingly, the 1980-81 policy, like the policy it renewed, included the standard pollution exclusion endorsement.

> The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance. [Liq. Ex. 1 at CF42]

Moreover, the Home policies also expressly provide that Home will not have a duty to defend.

Condition H of the policies provides:

> The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but The Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involve The Company, in which event the Insured and The Company shall co-operate in all things in the defense of such claim, suit or proceeding. [Liq. Ex. 1 at CF 43 (emphasis added)]

e. Maintenance of underlying insurance. The Home policies require that the Insured maintain the underlying policies in full effect except for payments of claims. If not, Home is only liable to the extent it would have been if the requirement were met. Condition Q provides:

> It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as they would have been had the Insured complied with the said condition. [Liq. Ex. 1 at CF43]

ARGUMENT

The parties agree that Connecticut law governs the insurance coverage issues.[4] The principles for interpreting insurance contracts are well settled in Connecticut.

> It is the function of the court to construe the provisions of the contract of insurance. The interpretation of an insurance policy involves a determination of the intent of the parties as expressed by the language of the policy including what coverage the insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy. A contract of insurance must be viewed in its entirety, and the intent of the

[4] This dispute concerns coverage for contamination by Holson's operations at a site in Connecticut under policies issued to Holson, which was located and operating at the site during the policy years. See Liq. Ex. 1 at CF40, 48, 56, 65, 75, 84, 94. In the circumstances, New Hampshire choice of law principles provide for application of Connecticut law. See Ellis v. Royal Ins. Co., 129 N.H. 326, 330 (1987).

> parties for entering it derived from the four corners of the policy giving the words of the policy their natural and ordinary meaning and construing any ambiguity in the terms in favor of the insured.

Hartford Cas. Ins. Co. v. Litchfield Mut. Ins. Co., 876 A.2d 1139, 1143-44 (Conn. 2005), quoting QSP, Inc. v. Aetna Cas. & Sur. Co., 773 A.2d 906, 913-14 (Conn. 2001) (ellipses and brackets omitted). In determining whether there is an ambiguity, a court "will not torture words to import ambiguity," and "any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms"; a provision is ambiguous "when it is reasonably susceptible to more than one reading." Connecticut Med. Ins. Co. v. Kukikowski, 942 A.2d 334, 338 (Conn. 2008) (citations and quotations omitted).

I. HOME HAD NO DUTY TO DEFEND BECAUSE THE HOLSONS FAILED TO SATISFY THEIR BURDEN OF SHOWING THAT THE KVL COMPLAINT ALLEGED A "SUDDEN AND ACCIDENTAL" RELEASE UNDER THE CONTROLLING SCHILBERG DECISION.

It is well established that "if the complaint alleges a liability which the policy does not cover, the insurer is not required to defend." Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., 826 A.2d 107, 122 (Conn. 2003), quoting QSP, Inc., 773 A.2d at 915. Home had no duty to defend here because the pollution exclusion applies, and the Holsons fail to show that the KVL complaint alleged a "sudden and accidental" release within the exception to the exclusion. The Holsons cite numerous cases regarding duty to defend issues, but they fail to mention the controlling Connecticut Supreme Court decision regarding that duty and the pollution exclusion, Schilberg Integrated Metals Corp. v. Continental Cas. Co., 819 A.2d 773, 788 (Conn. 2003), which held that the insured must show that the complaint brings the claim within the exception.

The pollution exclusion provides that:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants

> or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden and accidental. [Liq. Ex. 1 at CF46 (emphasis added)]

Under the plain language of this exclusion, claims regarding pollution are excluded from coverage unless the release of the contaminants was "sudden and accidental." The Connecticut Supreme Court has held that "the term 'sudden,' as used in [the "sudden and accidental" exception], requires that the release in question occur in a rapid or otherwise abrupt manner. The release of pollutants over an extended period of time cannot qualify as 'sudden' for purposes of the exception to the pollution exclusion." Buell Indus., Inc. v. Greater New York Mut. Ins. Co., 791 A.2d 489, 503 (Conn. 2001) (construing a sudden and accidental exception in a pollution exclusion identical to the Home pollution exclusions, see id. at 495 n.8). The insured bears the burden of showing that a release is "sudden and accidental" to obtain indemnity coverage under this exception to the pollution exclusion. Id. at 504.

The allegations of the complaint in the KVL Action set forth claims based upon the contamination of the Wilton site, and such claims plainly "arise out of the discharge, dispersal, release or escape of . . . toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land" within the pollution exclusion. See Holsons Br., Ex. A. The claims are thus excluded from coverage by the pollution exclusion unless they fall within the "sudden and accidental" exception. This means they must arise from a rapid or otherwise abrupt discharge as required by Buell.

Implicitly conceding that the KVL complaint does not allege such a discharge, the Holsons seek to bring the case within the sudden and accidental exception by contending that the allegations "do not foreclose" an accident with a sudden release and "do not eliminate the possibility that the exclusion may not apply." Holsons Br. at 17. However, the Connecticut

Supreme Court specifically rejected these arguments in Schilberg, 819 A.2d 773.[5] Under that case, the burden is on the insured to "demonstrate a reasonable interpretation of the complaint that brings the claim within the sudden and accidental discharge exception." Id. at 788 (emphasis added). Without such allegations there is no duty to defend.

In Schilberg, the Connecticut Supreme Court addressed whether insurance policies with a pollution exclusion identical to those here were obligated to defend against an environmental cleanup claim. See 819 A.2d at 778 & n.2. The court applied the logic of its decision in Buell, 791 A.2d 489, which had held in the indemnity context that "when a policy contains an exception [the "sudden and accidental" exception] within an exception [the pollution exclusion], the insurer need not negative the internal exception; rather the insured must show that the exception from the exemption from liability applies." Schilberg, 819 A.2d at 782. The court concluded this principle also applies to the determination of a duty to defend, so that "the burden of proving the applicability of the sudden and accidental discharge exception in the present [duty to defend] case properly rested with the plaintiff [policyholder]." Id at 783.

The court rejected the arguments now advanced by the Holsons. It noted that the policyholder argued that "under Connecticut law, the insurer bears the burden of establishing that the underlying allegations eliminate every reasonable possibility that the discharge of pollutants was 'sudden and accidental.' We disagree." Schilberg, 819 A.2d at 781 (emphasis added, punctuation and ellipses omitted). The court later stated that "the plaintiff cannot prevail on its claim merely by relying on the fact that the allegations in the underlying complaint do not

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[5] All of the cases cited by the Holsons in their duty to defend argument pre-date the 2003 Schilberg decision. Holsons Br. at 14-19. Indeed, the Holsons cite two of the cases that the plaintiff in Schilberg cited as support for the position rejected by the court. Schilberg, 819 A.2d at 781 n.5, citing EDO Corp. v. Newark Ins. Co., 898 F. Supp. 952 (D. Conn. 1995), and Cole v. East Hartford Estates Ltd. Partnership, Superior Court, Judicial District of Hartford-New Britain at Hartford, Docket No. CV95-0547179S (May 15, 1996). See Holsons Br. at 15-16.

eliminate all reasonable possibility of a sudden and accidental discharge of pollutants." Id. at 788. The court held that:

> The relevant inquiry, therefore, is not whether the substance of the department's allegations rules out the possibility of a sudden and accidental discharge, as the plaintiff suggests, but, rather, whether the plaintiff has demonstrated that a reasonable interpretation of the substance of the department's allegations potentially would bring the claims within the purview of the sudden and accidental discharge exception to the policies. An insured does not satisfy its burden of proving the applicability of the sudden and accidental discharge exception, however, by the assertion of conclusory statements, or reliance on mere speculation or conjecture as to the true nature of the facts. . . . [A] court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable.

Id. at 784-85 (citations and quotations omitted) (emphasis added). The court then examined the allegations of the complaint before it and concluded there was no duty to defend because the complaint did not show that the event that caused the pollution was sudden and accidental. Schilberg, 819 A.2d at 785-88. It agreed with the Second Circuit's decision in Stamford Wallpaper Co. v. TIG Ins., 138 F.3d 75, 80 (2d Cir. 1998), that "in order for the sudden and accidental [discharge] exception to apply, the allegations within the four corners of the complaint must raise the possibility that the event which caused the pollution-related property damage was sudden and accidental." 819 A.2d at 787.[6]

The KVL complaint plainly sought to recover damages on account of the release of contaminants at the Wilton site, so the pollution exclusion applies. As with the complaints at issue in Schilberg and Stamford, the KVL complaint contains no allegations that reasonably raise the possibility that the event or events that caused the contamination at the Wilton site were in fact sudden and accidental. See Holsons Br., Ex. A. The complaint merely alleges that Holson manufactured photograph albums at the site from 1968 until 1988 (¶12); that contamination at

[6] In Stamford, the Second Circuit – applying Connecticut law – rejected the reasoning of New York v. Blank, 27 F.3d 783 (2d Cir. 1994) (applying New York law), on which the Holsons rely here. See Stamford, 138 F.3d at 81; Holsons Br. at 17-18.

the site is concentrated in areas surrounding several large underground concrete "vaults" connected to the building on the site through a network of underground piping, and that the vaults are constructed with pervious sidewalls designed to allow their contents to "leach" out into the surrounding soil (¶ 20); that a consultant concluded that "disposal practices" at the facility introduced solvent contaminated materials into the sump and vaults, which in turn resulted in contamination of soils and groundwater (¶ 22); that there has been a "release" of hazardous substances at the site (¶ 30); that there was "improper disposal" of the substances found around the vaults (¶ 44); that there were violations of environmental laws and/or standards at the site (¶ 51); and that there was "disposal or leakage" (sometimes alleged to be "improper") of hazardous substances at the site (¶¶ 57, 61, 62). (The amended complaint is to the same effect.)

These allegations do not suggest that the releases of contaminants were "sudden and accidental." Thus, the Holsons' have not satisfied their burden of demonstrating "a reasonable interpretation of the complaint that brings the claim within the sudden and accidental discharge exception." Schilberg, 819 A.2d at 788. The Holsons contentions are just the type of speculation that the Schilberg and Stamford courts found insufficient to require a defense in the face of a pollution exclusion. Accordingly, Home had no obligation to defend the KVL action.

II. EVEN IF A "SUDDEN AND ACCIDENTAL" RELEASE HAD BEEN ALLEGED, HOME HAD NO DUTY TO DEFEND BECAUSE THE HOME EXCESS POLICIES DO NOT PROVIDE A DUTY TO DEFEND BUT ONLY TO PAY DEFENSE EXPENSES AFTER THE PRIMARY INSURANCE IS EXHAUSTED, WHICH IT IS NOT.

Even if the KVL complaint did set forth a claim based on a "sudden and accidental" release, the Home policies do not provide for a duty to defend but only for payment of defense costs once the underlying policies have been exhausted. Neither the primary insurers' denial of coverage nor the settlements between the Holsons and the primary insurers satisfies the exhaustion requirement.

A. The Home Policies Do Not Provide A Duty To Defend Pollution Claims.

The Holsons repeatedly assert that Home had an obligation to defend, but in the absence of a policy provision on the point, there is no basis for a duty to defend. See Hartford, 876 A.2d at 1143-44 (interpretation of policy "involves a determination of the intent of the parties as expressed in the language of the policy" and as "derived from the four corners of the policy"). To find a duty to defend, the Holsons point only to Endorsement 2 to the Home policies. Holson Br. at 5-6. That endorsement to Home policies for periods after August 12, 1977 amended the "Limits of Liability" provision and added a duty to defend for certain claims not covered by the underlying policies. However, it is not relevant here in light of the pollution exclusion's limitation of pollution coverage to matters covered by the scheduled underlying policies.

The "Limit of Liability" provisions in the Home policies originally read, in pertinent part:

> The Company shall be only liable for the ultimate net loss the excess of either
> (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances;
> or (b) $25,000 ultimate net loss in respect of each occurrence not covered by underlying insurances, . . . [Liq. Ex. 1 at CF41]

The endorsement cited by the Holsons amended section (b) to read: "$10,000 ultimate net loss in respect to each occurrence not covered by underlying insurance." Id. at CF58. It also added a new "Defense Settlement" provision:

> With respect to any occurrence not covered by the underlying policies listed on Endorsement 1 hereof or any other underlying insurance collectible by the insured, but which is covered by the terms and conditions of this policy . . . the Company shall:
>
> (a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof . . .
>
> Coverage afforded under this Insuring Agreement shall not apply to defense, investigation, settlement or legal expenses covered by underlying insurances. [id. (emphasis added)]

The Home policies thus generally provided (a) excess coverage (but not a duty to defend) for occurrences "covered" by the scheduled underlying policies, and (b) coverage (including a duty to defend) for occurrences "not covered" by the scheduled underlying policies or any other underlying insurance but covered under the terms and conditions of the Home policy.

The duty to defend language found in the "Defense Settlement" provision has no application here because the pollution exclusion limits coverage of pollution claims like the KVL Action to instances covered by the scheduled underlying policies. The pollution exclusion specifically provides that "in no event shall coverage provided by this policy for Contamination or Pollution be broader than that provided by the Underlying Insurances set forth in the Schedule of Underlying Insurances." Liq. Ex. 1 at CF55 (emphasis added). The plain meaning of this language is that the Home policies can only provide coverage for pollution claims if the primary policy does; they provide no independent coverage for such claims. The "Defense Settlement" provision for claims "not covered" by underlying insurance but covered by the Home policies thus does not apply to pollution claims, and there is no duty to defend such claims.[7]

The Holsons suggest that the Home policies provide a duty to defend because the claims in the KVL Action exceeded the limits of the primary policies. Holsons Br. at 6-7. This is not evident from the KVL complaint itself, which does not state an amount. In any event, there is no applicable provision in the Home policies that would provide a duty to defend. Since the "Defense Settlement" provision of Endorsement 2 does not apply to pollution claims, the Home policies are true excess policies that only sit above scheduled underlying policies.[8]

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[7] Since there could be no pollution claims covered by the Home policies that were not covered by the underlying policies, this case is distinguishable from American States Ins. Co. v. Allstate Ins. Co., 891 A.2d 75, 84-85 (Conn. App. 2006), where the umbrella insurer provided a defense after the primary insurer refused. The umbrella policy there provided coverage for the claims, which were "not covered" by the insured's other policies.

[8] This distinguishes American Motorists Ins. Co. v. The Trane Co., 544 F. Supp. 669, 692 (W.D. Wis. 1982), relied on by the Holsons. The court there found an excess duty to defend because the claim was not covered by an underlying policy but was covered under the excess policy. As described above, the Home policies here provide no

B. Any Home Obligation Regarding Defense Has Not Attached Because The Primary Policies Have Not Been Exhausted By Payment.

The Home excess policies are not obligated to provide a defense, only to pay defense costs, and then only once the underlying limits have been exhausted by payment. The exhaustion requirement has not been satisfied.

The Home policies define "Ultimate Net Loss" to include defense costs, and that definition specifically excludes expenses included in other insurance (such as those incurred by a primary insurer in defending the insured). Under the policies, Home is only liable for ultimate net loss "in excess of" the limits of the underlying insurance, see the "Limit of Liability" provision (Liq. Ex. 1 at CF41), and liability under the policies "shall not attach unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits" under the "Loss Payable" provision of Condition J (id. at CF43) (emphasis added).

If there were any doubt that the policies only provide for defense costs after the underlying limits are exhausted by payment, they further provide that Home "shall not be called upon to assume charge of the settlement or defense of any claim." Condition H (Liq. Ex. 1 at CF43). Home thus has no duty to defend, only a right to associate with a defense if it chooses. Accordingly, Home at most could have an obligation to pay defense expenses Ultimate Net Loss once the underlying limits have been paid. See 1 B. Ostrager & T. Newman, Insurance Coverage Disputes § 6.03[e] at 412 (14th ed. 2008) ("A majority of courts have held that an excess insurer with the right to associate does not have any duty to defend the insured until primary coverage is exhausted."). The Connecticut Superior Court has relied on Condition H in denying an insured's request for a defense. Reichhold Chem., Inc. v. Hartford Acc. & Indem. Co., 1999 Conn. Super.

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broader coverage for pollution claims than the underlying policies, so there can be no pollution claim covered by the Home policies that is not covered by the underlying policies.

LEXIS 2066 at *29 (Conn. Super. Feb. 11, 1999), reversed on choice of law grounds and remanded for consideration under New York law, 750 A.2d 1051 (Conn. 2000).

Finally, even if the right to associate were somehow considered a duty to defend, it is well-established that excess policies do not have an immediate duty to defend, which is instead an obligation of the primary insurer that continues until the primary limits are exhausted. See 14 L. Russ & T. Segalla, Couch on Insurance 3d § 200:38 at 200-53 (2007) ("As a general rule, a true-excess insurer is not obligated to defend its insured until all primary insurance is exhausted or the primary insurer has tendered its policy limits."). As stated in Appleman:

> Excess insurance, however, is secondary coverage that does not attach until a predetermined amount of primary insurance is exhausted. Hence, the primary insurer's duty to defend the insured continues until the lawsuit is concluded, until its policy limits are exhausted, or until there is no potential for coverage under its policy.

23 Appleman on Insurance 2d § 145.2[A] at 6-7. See 1 Ostrager & Newman, Insurance Coverage Disputes § 6.03[b] at 402 ("The traditional view is that an excess insurer is not required to contribute to the defense of the insured so long as the primary insurer is required to defend.").[9]

1. The primary insurers' denial of a defense did not trigger any Home obligation to pay defense expenses.

The Holsons attempt to get around the exhaustion requirement by asserting that the primary insurers "wrongfully" denied coverage and that this required Home to defend.

[9] As this suggests, the cases cited by the Holsons for a concurrent excess duty to defend are a minority view. The cases are also distinguishable because they do not involve true excess insurance but concurrent primary policies one of which is excess to the other due to application of "other insurance" clauses. Guaranty Nat'l Ins. Co. v. American Motorists Ins. Co., 758 F. Supp. 1394, 1397 (D. Mont. 1991), addressed two motor vehicle policies that both provided for a duty to defend, one of which was excess of the other under its "other insurance" provision. Id. at 1395. The court asserted that duty to defend obligations "do not arise out of contract, but are based upon equitable principles," id. at 1397, but in Connecticut, the obligations of the insurer must be based on contract language. Siligato v. Welch, 607 F. Supp. 743, 746 (D. Conn. 1985), also involved two motor vehicle policies that both provided a duty to defend. The court held that the "secondary" or "excess" insurer was obligated to defend on default of the primary insurer, subject to its right to be indemnified by the primary insurer. Id. Again, the Home policies are "true" excess policies over scheduled underlying policies, and the policies only provide for payment defense costs after the underlying limits are paid.

However, "[a]s a general rule, a true excess insurer's duty to defend is not automatically triggered when the primary insurer denies coverage." 14 Couch on Insurance 3d § 200:43 at 200-58. This is particularly the case here, where there is no duty to defend, and the policies are clear that liability for ultimate net loss (including defense costs) only attaches when the underlying limits are paid. The underlying limits clearly had not been paid when notice of the KVL Action was given to Home in 1991 and again in 1995. Failure – if such it was – of a primary insurer to defend thus does not shift the obligation to an excess insurer. "Rather, the true excess [insurer's] defense obligations are contingent upon the excess policy's terms and conditions." Id. at 200-58 to 200-59. The Home policies' terms do not provide for even payment of defense expenses until the primary coverage is exhausted. See National Union Fire Ins. Co. v. Travelers Ins. Co., 214 F.3d 1269, 1273-74 (11th Cir. 2000) (no justification for extra-contractual duty to defend where excess insurance contract does not require it).[10]

2. The settlements between Holsons and the primary insurers did not transfer a defense obligation to the excess insurer Home.

The Holsons finally contend that their settlements with the primary insurers served to extinguish the primary insurers' duty to defend and thus transfer that duty to the excess insurer

[10] The cases cited by Holsons are distinguishable. See National Union, 214 F.3d at 1273-74 n.8. In Hocker v. New Hampshire Ins. Co., 922 F.2d 1476, 1482 (10th Cir. 1991), the court held that an excess insurer must "drop down" for occurrences that are, in fact, covered by the underlying insurance despite the wrongful denial of coverage by the primary insurer. This holding, however, turned upon language in the insuring agreement that provided a duty to defend for occurrences "not covered, as warranted, by the underlying policies." Id. at 1481 (quoting insuring agreement). The court noted that the "as warranted" language modified "not covered" so that the insured agrees to drop down when the terms of the underlying policy "warrant" coverage, even if the primary insurer denies coverage; without the phrase "as warranted", the excess policy drops down only in the event the underlying policy in fact does not provide coverage. Id. at 1482 & n.5, citing Mission Nat'l Ins. Co. v. Duke Transp. Co., Inc., 792 F.2d 550, 553 (5th Cir. 1986). The Home policies do not have "as warranted" language, and since the Home policies provide no broader coverage for pollution claims than the primary, there is no situation where they could drop down for lack of underlying coverage. In American Family Assur. Co. v. United States Fire Co., 885 F.2d 826, 832 (11th Cir. 1989), the court held that absent a contractual obligation an excess insurer is not obligated to provide a defense, but it found such an obligation in a provision that provided that if underlying insurance is exhausted, the insurer "shall be obligated to assume charge of the settlement or defense." It implicitly held, without explanation, that the underlying insurer's refusal to defend exhausted the primary insurance. Id. The Liquidator submits this does not follow, but in any event the Home policies have no such language and they only provide for payment of defense costs after the underlying limits have been paid.

Home. It is undisputed that the primary insurers paid Holsons, not KVL, and that the settlements did not end the KVL Action, which continued. The primary carriers and the insured cannot by such an agreement transfer the primary insurers' duty to defend to the excess insurer. While those parties may have agreed to truncate the primary insurers' obligations prior to conclusion of the lawsuit, that does not obligate Home to step in before liability attaches under its policy terms.

First, Home can only become liable once the primary limits are exhausted, which requires payments to resolve the insured's liability to the claimant, not voluntary agreements between the insured and primary insurer to resolve disputed coverage and defense obligations. Under Home's policies, Home is only liable for Ultimate Net Loss "the excess of" the limits of the underlying insurers, see "Limits of Liability" (Liq. Ex. 1 at CF 41), and liability does not attach "unless and until the Insured, or the Insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence." "Loss Payable" Condition J (id. at CF 43) (emphasis added). This language plainly requires payment of the underlying limits on account of loss, not a compromise of the duty to defend – which is in addition to the underlying limits.

The settlements here did not exhaust the primary limits by payment of loss. Indeed, the Holsons have advised that the settlement payments were not used to pay KVL at all. Instead, they were used solely to "defray" part of the defense costs in the KVL Action. Liq. Ex. 3 at 3. The payments thus were not of the primary limits, but served to avoid defense obligations which do not count against those limits. See 23 Appleman on Insurance 2d § 145.2[A] at 6-7 ("[T]he primary insurer's duty to defend the insured continues until the lawsuit is concluded, until its policy limits are exhausted, or until there is otherwise no potential for coverage under its policy. In order to exhaust its policy limits, a primary insurer must actually pay a settlement in exchange for its insured's release, or in full or partial satisfaction of a judgment against its insured.").

The Holsons contend that payment of the underlying limits is not required. However, the Home policies require that the underlying limits actually be paid before any liability attaches to Home, and the Connecticut courts have enforced exhaustion by payment requirements. See Continental Ins. Co. v. Cebe-Habersky, 571 A.2d 104 (Conn. 1990) (claimant's settlement for $3,000 less than policy limits was not payment of primary limits to trigger secondary policy even though claimant would credit secondary insurer with full policy limits). The Holsons' reliance on Zeig v. Massachusetts Bonding & Ins. Co., 23 F.2d 665 (2d Cir. 1928), and other cases from other jurisdictions interpreting payment requirements to permit an excess insurer's liability to be triggered by a primary settlement for less than policy limits, is accordingly misplaced.[11] The Connecticut courts apply clear policy language in accordance with its terms. In light of Cebe-Habersky, it is clear that Connecticut would follow the courts that have rejected Zeig and held that an insured may not settle with its primary insurer for less than policy limits and then turn to the excess insurer for unreimbursed defense and indemnity costs in excess of the limit.

The California Court of Appeal held that such a below-limits primary settlement did not trigger an excess insurer's liability in Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London, 73 Cal. Rptr. 3d 770 (Cal. App. 2008). It declined to follow Zeig for several reasons:

> First, the court appeared to place policy considerations . . . above the plain meaning of the terms of the excess policy . . . . Second, we disagree with its strained interpretation of the word 'payment.' . . . Third, the Zeig court acknowledged that parties in these circumstances may include excess policy language explicitly requiring actual payment as

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[11] It is noteworthy that Zeig did not involve any defense issues. It only held that an excess insurer's indemnity obligation was triggered under a clause requiring that primary insurance be "exhausted in the payment of claims to the full amount of the expressed limits" when the loss exceeded the primary limit and the excess insurer was only called upon to pay the portion in excess of the primary limit. 23 F.2d at 666. The court held that there was no "rational advantage" to the insurer in requiring actual collection of the primary insurance, although it recognized that that result would apply "when the terms of the contract demand it." Id. This case involves a question of the duty to defend, and there is thus good reason for the excess insurer to require actual payment of the underlying limits in satisfaction of claims. It is only when those limits are paid to resolve claims that the primary duty to defend ceases. Further, the Home policies terms expressly specify that liability only attaches when the underlying limits have been actually paid and that Home is not liable for defense costs that are within other insurance.

> a condition precedent to coverage and that a court may reach a contrary result "when the terms of the contract demand it."

Id. at 780 (citations omitted); see id. at 782. Similarly, in Comerica Inc. v. Zurich Am. Ins. Co., 498 F. Supp. 2d 1019 (E.D. Mich. 2007), the court declined to follow Zeig. Id. at 1029-32. The insured had settled lawsuits for $21 million, but the primary insurer with $20 million limits disputed coverage and settled with Comerica for $14 million including an agreement that the primary policy would be deemed fully exhausted. Id. at 1020, 1025-26. The court denied Comerica's claim against the excess insurer stating: "Payments by the insured to fill the gap, settlements that extinguish liability up to the primary insurer's limits, and agreements to give the excess insurer 'credit' against a judgment or settlement up to the primary insurer's liability limit are not the same as actual payment." Id. at 1032. The Wisconsin Supreme Court has similarly held that "[a] 'settlement plus credit' does not constitute 'payment' of liability limits as that term is commonly and ordinarily understood." Danbeck v. American Family Mut. Ins. Co., 629 N.W.2d 150, 155 (Wis. 2001).[12] These cases demonstrate that proper respect for policy language requires that the primary insurers must pay their policy limits before Home's policies could attach, and that a settlement that merely provides payment of part of the outstanding defense costs does not suffice. The primary policies have not been exhausted, and Home accordingly has no obligations regarding the KVL Action.

Second, Connecticut law is also clear that an insured cannot by agreement with its primary insurers reduce their obligations and transfer them to the excess insurer. An insured's

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[12] See also Federal Ins. Co. v. Srivastava, 2 F.3d 98, 101-02 (5th Cir. 1993) (settlement between insured and carriers to resolve the first $22 million of a $31.6 million judgment for a payment of $8.5 million did not trigger excess policy for layer starting at $22 million: the primary insurers were shifting part of their contracted-for risk to the excess carrier); United States Fire Ins. Co. v. Lay, 577 F.2d 421, 423 (7th Cir. 1978) (excess insurer is not liable where claimant settled with the insured and primary carrier for less than the amount of the primary coverage: "[w]e can conceive of good reasons for an excess carrier to be unwilling to accept liability unless the amount of the primary policy has actually been paid. A settlement for less than the primary limit that imposed liability on the excess carrier would remove the incentive of the primary insurer to defend in good faith or to discharge its duty to represent the interests of the excess carrier.") (citation omitted).

agreement to accept less than full performance by its primary insurers at least makes the insured responsible for the obligations that otherwise would rest on those insurers. See Security, 826 A.2d at 127. In Security, the insured ACMAT had entered into a "buy-back" agreement with Lumbermens, under which Lumbermens paid $300,000 for a release of its obligations under certain liability polices for a two year period (the "buy-back period"). Id. at 112-13. Another insurer, Security, then sought to allocate defense costs to the insured for the buy-back period. The court agreed. "The buy-back period presents not a period of time for which ACMAT failed to obtain insurance, but rather a period for which it contractually assumed the liability of its insurer in exchange for $300,000." Id. at 127.[13] So here, by entering a buy-back agreement with Fireman's Fund, and likely also with Travelers, the Holsons assumed the liability otherwise assigned to those insurers.[14] The Holsons cannot now turn to Home for defense costs that rightfully should have been paid by Travelers and Fireman's Fund.[15]

The Home policies' definition of "Ultimate Net Loss" expressly provides that Home "shall not be liable" for defense expenses "when such expenses are included in other valid and collectible insurance." Liq. Ex. 1 at CF41-42. The Holsons' choice to release the primary

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[13] The cases cited by the Holsons holding that settlement with the primary insurer can functionally exhaust primary coverage have generally only involved on the duty to indemnify, and they have clearly recognized that the policyholder becomes obligated for the difference in coverage. See Koppers Co., Inc. v. The Aetna Cas. & Sur. Co., 98 F.3d 1440, 1454 (3d Cir. 1996) ("[B]y settling the policyholder loses any right to coverage of the difference between the settlement amount and the primary policy's limits. The excess insurer cannot be made liable for any part of this difference because the excess insurer never agreed to pay for losses below a specified floor."); Archer Daniels Midland Co. v. Aon Risk Servs., Inc., 356 F.3d 850, 859 (8th Cir. 2004). A case that appears to differ rests in part on policy language requiring that the excess insurer provide "underlying insurance," and in any event does not address the language in the Home policies providing that liability only attaches upon payment of the underlying limits. E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 853 F. Supp. 98, 101-02 & n.4 (S.D.N.Y. 1994). Insurance Co. of Penn. v. Associated Int'l Ins. Co., 922 F.2d 516 (9th Cir. 1990), involved reinsurance issues.

[14] The Holsons have not provided the Travelers agreement on the ground that it is confidential and Travelers has not agreed to its release. If they dispute this characterization, then it should be produced subject to confidentiality order.

[15] The only cases cited by Holsons that involved a duty to defend are distinguishable. The court in Drake v. Ryan, 514 N.W.2d 785, 789 (Minn. 1994), itself distinguished the case before it, involving two motor vehicle policies, from a true excess/primary situation, and the case involved a settlement with the claimant. Pacific Employers Ins. Co. v. Servco Pac., Inc., 273 F. Supp. 2d 1149, 1152 n.4, 1154-55 (D. Haw. 2003), involved an excess policy with an express duty to defend upon exhaustion of underlying insurance, and the court noted that the insured conceded it could only collect defense costs "from the date of settlement" with the primary insurer, not past defense costs.

insurers from their duties to defend does not render the insurance invalid or uncollectible within the meaning of this provision. An insured's voluntary decision to settle with an insurer and forego disputed insurance coverage cannot make another insurer liable for it.

This is confirmed by the requirement of the Home policies' "Maintenance of Underlying Insurance" provision that the underlying insurances "shall be maintained in full effect" except for reductions in limits "solely by payment of claims." Condition Q (Liq. Ex. 1 at CF43). Here, the Fireman's Fund policy has not been maintained – it has been "bought back." See Liq. Ex. 6. The same is likely the case for the Travelers' policy. The primary limits have not been reduced by payment of claims. The policies at issue are liability policies, not first party policies, and the phrase "payment of claims" necessarily refers to payments to claimants, not payments to insureds for disputed coverage and defense obligations. The agreements thus violated the Holsons' obligation to maintain the underlying policies in full effect, in which case the primary policies would have paid the costs of defending the KVL Action.

By settling with the primary insurers without a payment to KVL to resolve the lawsuit, Holsons prematurely released the insurers from their duty to defend. Under Condition Q, Home can only be liable to the same extent as if the primary policies had remained in effect and paid the defense expenses until the KVL case was resolved. Liq. Ex. 1 at CF43 (if the insured does not maintain the underlying insurance, "the Company shall only be liable to the same extent as they would have been had the Insured complied with the said condition"). Since no payments of claims were even arguably made until the Holsons settled with KVL in September 2002, the primary insurers were obligated to defend the KVL Action at least until that time, which was after the KVL Action had been tried and the court's opinion issued. Accordingly, Home is not liable for any defense costs, all of which properly should have been paid by the primary insurers.

III. HOME IS NOT LIABLE TO INDEMNIFY THE HOLSONS.

The Holsons contend that Home is obligated to indemnify them for whatever part of the $612,000 settlement is in excess of primary limits. This is not the case for several independent reasons. First, the pollution exclusion precludes coverage of any claims based on pollution not arising from a "sudden and accidental" release. Under Buell, it is the insured's burden to show that the claims fall within this exception to the pollution exclusion. 791 A.2d at 503-504. The Holsons have not met this burden, see Part I above, so there is no Home obligation to indemnify. Second, the KVL court found that the Holsons had made fraudulent misrepresentations to KVL involving known untruths for the purpose of inducing KVL to purchase the site, Liq. Ex. 9 at CF168-74, reflecting "such a high degree of recklessness as to be tantamount to bad faith" and warrant an award of punitive damages. Id. at CF181. Such conduct is not an occurrence within the Home policies, which provide coverage only for harm that results "unexpectedly and unintentionally." Liq. Ex. 1 at CF41 (definition of "Occurrence"). Deliberate acts that are inherently injurious or which inevitably result in injury are not occurrences under Connecticut law. Providence Washington Ins. Group v. Albarello, 784 F. Supp. 950, 953-55 (D. Conn. 1992) (discharge of employee and conversion of stock are not occurrences). Third, under Connecticut law, claims for progressive injuries are allocated pro rata to the insurers (and insureds, where self-insured) across the years during which the injury continued. Security, 826 A.2d at 119-22. The operations at the Wilton site took place from 1966 through 1988, so the $612,000 settlement should be spread across many years. The policies scheduled to underlie the Home policies from 1973 to 1981 had at least $650,000 in primary limits, so the excess layer has not been reached.

The Holsons contend that Home breached a duty to defend and therefore cannot assert defenses to coverage, citing Missionaries of the Company of Mary, Inc. v. Aetna Cas. & Sur.

Co., 230 A.2d 21, 25-26 (Conn. 1967). However, as noted in Part II, Home did not have a duty to defend. As to pollution claims, Home could only have a duty to pay defense expenses once the primary policies were exhausted by payment. The rationale of the Missionaries case does not extend to this situation. It only applies where the insurer could have chosen to defend subject to a reservation of rights to contest its obligation to indemnify. See 230 A.2d at 25-26.

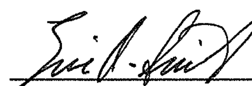
CONCLUSION

The Referee should sustain the Liquidator's determination denying the Holsons' claim for lack of coverage under the Home policies.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,
By his attorneys,
KELLY A. AYOTTE
ATTORNEY GENERAL

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

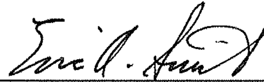


J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

June 15, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Section 15 Submission, the Liquidator's Exhibits and the collection of non-New Hampshire authorities were sent via e-mail on June 15, 2009 to counsel for the Holsons.



Eric A. Smith