STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-WB-CV-09-35

IRVING OIL LIMITED & HIGHLANDS FUEL DELIVERY, LLC,

Plaintiffs,

v.

ACE INA INSURANCE,

Defendant

ORDER ON IRVING OIL LIMITED'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ACE INA INSURANCE'S MOTIONS TO JOIN INDISPENSABLE AND ADDITIONAL PARTIES

Plaintiff Irving Oil Limited ("IOL") has been named as a defendant in numerous lawsuits alleging that gasoline refined by IOL in Canada and blended with the additive methyl tertiary butyl ether ("MTBE") has, through distribution and use in the United States, damaged public and private water supplies (the "MTBE Lawsuits"). In 2011, and again in 2013, the Court addressed motions by IOL seeking partial summary judgment regarding the duty to defend of Defendant ACE INA Insurance ("ACE") in certain MTBE Lawsuits. Presently, IOL moves for partial summary judgment declaring that: 1) ACE has a duty to defend IOL in a pending MTBE lawsuit filed by the State of Vermont under umbrella liability policies in effect from March 31, 1997 through March 31, 2004; and 2) that ACE breached its duty to defend IOL against a now settled MTBE lawsuit brought by the State of New Hampshire. ACE responds that its duty to defend IOL in the Vermont MTBE Lawsuit has not been triggered and its duty to defend in the New Hampshire MTBE Lawsuit was not triggered.

The Court initially heard oral argument on IOL's motion for partial summary judgment on January 26, 2015. On April 3, 2015, ACE requested the Court defer issuing an order on

IOL's motion to allow ACE time to review a large document production it received from IOL after the oral argument. On May 15, 2015, following briefing on ACE's motion to defer, the Court provided ACE additional time to review the production and an opportunity to supplement the summary judgment record, if necessary. On June 5, 2015, ACE submitted a supplemental statement of material facts, and a supplemental memorandum in support of its opposition to IOL's motion for partial summary judgment. IOL responded to these supplemental documents on June 19, 2015 and ACE filed a reply on July 6, 2015. The Court scheduled a second oral argument on IOL's motion for partial summary judgment for September 18, 2015. Two days before oral argument, on September 16, 2015, ACE submitted a second motion for leave to supplement the summary judgment record with recently produced evidence.

The Court held oral argument on September 18, 2015. At oral argument, IOL objected to ACE's second motion for leave to supplement as an untimely effort to "kick the can down the road." Based on the Court's limited opportunity for review and representations of counsel, the Court made a ruling from the bench both admitting and excluding certain supplementary evidence.[1] The Court did not, however, issue a ruling about whether, and to what extent, it would consider the legal arguments raised in ACE's second motion to supplement.

Upon review, the Court refuses to consider the legal arguments raised in ACE's second motion to supplement as untimely and waived. Maine Rule of Civil Procedure 56(f) provides a mechanism whereby a party opposing a motion for summary judgment may request a

[1] Specifically, the Court excluded the affidavit of Bernd Heinze and the exhibits attached thereto from the record. The Court also excluded exhibits 9-13, 15-18, 22-23, and 28 to the 9/16/15 affidavit of Brett Leland from the record as untimely and/or already in the record. The Court admitted exhibits 1-3, 5-8, 14, 19-21, 24, 26-27, and 29-30 to the 9/16/15 Leland Aff. without objection from IOL. The parties did not discuss exhibit 26 to the 9/16/15 Leland Aff. at oral argument. In the absence of a compelling reason to admit this exhibit, the Court excludes it as untimely. The Court also excludes exhibit 4 to the 9/16/15 Leland Aff. as both untimely and hearsay.

continuance in order to carry out additional discovery that is necessary to their opposition. While it is clear that at least some of ACE's arguments stem from evidence that was not previously available, if ACE believed that this information was necessary to their opposition, it could have—and should have—moved for a continuance pursuant to M.R. Civ. P. 56(f) when it filed its opposition in January 2015. To illustrate, ACE was aware since at least November 2014 that IOL relied heavily on the affidavit of Stephen McCormick in support of its motion for partial summary judgment. Nevertheless, ACE did not request a continuance so that it could depose Mr. McCormick in its initial opposition, in its motion to defer judgment, *or* in its first motion to supplement the record. Instead, ACE filed its second motion to supplement the record two days before oral argument without prior notification or warning to the Court. Because ACE did not comply with M.R. Civ. P. 56 despite ample opportunity to do so, the Court will not consider the arguments raised in ACE's second motion to supplement because they are untimely and waived.

In addition to IOL's motion for partial summary judgment, ACE's motion for the joinder of Royal Insurance Company of Canada as in indispensable party and motion for the joinder of Arrowood Indemnity Company, Zurich Insurance Company, and Zurich American Insurance Company as necessary parties are also pending before the Court.

For the reasons discussed below, the Court grants in part and denies in part IOL's partial motion for summary judgment and denies ACE's motions for joinder.

I. Background

IOL is a corporation organized under the laws of New Brunswick, Canada, which refined gasoline containing an oxygenate known as MTBE from 1991 to 2004. (IOL's S.M.F. ¶¶ 1-2; 11/12/14 McCormick Aff. ¶ 3.) IOL asserts that it refined gasoline in New Brunswick, Canada, and that the gasoline was subsequently imported into the United States by American subsidiaries.

(11/12/14 McCormick Aff. ¶ 3.) Thereafter, IOL alleges that the gasoline was distributed within the United States by Highlands, a Maine corporation and IOL subsidiary. (*Id.*) IOL, along with other petroleum companies—including Highlands—has been sued in more than sixty lawsuits involving damage caused by MTBE. (*See id.* ¶ 12.) The lawsuits at issue in the present dispute are those brought by the States of New Hampshire and Vermont. In 2003, the State of New Hampshire sued IOL, along with Highlands and a number of other defendants, in a suit captioned *State of New Hampshire v. Hess Corp.*, No. 03-C-550 (N.H. Super. Ct.) (hereinafter, the "*NH Lawsuit*" or "*NH MTBE Lawsuit*"). (IOL's S.M.F. ¶ 6.) While the particular allegations of the *NH Lawsuit* will be discussed in greater detail *infra* section II(D), the action stemmed from alleged damages caused by the presence of MTBE in the waters of New Hampshire. (*See* Ex. 5 to 11/12/14 McCormick Aff., the "*NH Complaint*".) In November 2012, IOL and Highlands entered into a settlement agreement with the State of New Hampshire (the "*NH Settlement*" or "*NH Settlement Agreement*").

Following IOL's settlement of the *NH Lawsuit*, there were no MTBE lawsuits pending against IOL until the State of Vermont filed a suit captioned, *State of Vermont v. Atlantic Richfield Co.*, No. 340-6-14 (Vt. Super. Ct.) (hereinafter, the "*VT Lawsuit*" or "*VT MTBE Lawsuit*"). (IOL's S.M.F. ¶ 8.) ACE disclaims any duty to defend or indemnify IOL for the MTBE Lawsuits, including the *VT* and *NH Lawsuits*.

A. IOL's Self-Insured Retentions and Primary Policies

From March 31, 1990 through March 31, 2003,[2] IOL procured a primary, commercial general liability ("CGL") policy from Royal Insurance Company of Canada, which is now

[2] The policy periods of the pertinent insurance policies in the present case begin on March 31 of a given year and extend through March 31 of the following year. In the interests of brevity, the Court will refer to a given policy period solely by the years involved, unless otherwise stated.

known as Royal & Sun Alliance Insurance Company of Canada ("RSA").[3] (IOL's S.M.F. ¶ 28; *see also* ACE's Opp. S.M.F. ¶¶ 66-123.) Specifically, IOL procured insurance through RSA Policy No. 25000711, which was renewed, with varying amendments and endorsements, throughout the aforementioned period. (*See id.*) From March 31, 2003 through March 31, 2004, IOL procured primary CGL Policy No. 88315516 from Zurich Insurance Company ("Zurich"). (IOL's S.M.F. ¶¶ 27-28; *see also* ACE's Opp. S.M.F. ¶¶ 124-131.) As discussed in greater detail *infra* section II(F), the RSA and Zurich Policies sat above self-insured retentions ("SIRs") applicable to each policy year in amounts ranging from $500,000 to $1.5 million.[4] (*See* IOL's S.M.F. ¶ 28.) The SIRs generally provided that there would be a retention for the account of IOL, in an amount designated, from the total amount of damages and costs as finally determined on account of each claim covered under the primary policies. (ACE's Opp. S.M.F. ¶¶ 70, 83, 96; *see also id.* ¶¶ 115, 128.) In layman's terms, the SIRs required IOL to pay out specified amounts before RSA and Zurich began to pay under their respective policies. *See, e.g.*, BLACK'S LAW DICTIONARY 1482 (9th ed. 2009) (defining "self-insured retention" as "[t]he amount that is not covered by an insurance policy and that usu[ally] must be paid before the insurer will pay benefits …").

Once the SIRs were satisfied, the primary policies provided various limits of liability, including aggregate limits for the sum of all damages arising out of the "Products—Completed Operations Hazard." (*See* IOL's S.M.F. ¶ 28.)

To illustrate, a policy period from March 31, 1990 until March 31, 1991, will be referred to as the 1990 to 1991 policy period, or simply the 1990 to 1991 policy.

[3] For the sake of clarity, the Court refers to both RSA and Royal Insurance Company of Canada as "RSA," unless otherwise specified.

[4] Although ACE denies and objects to certain portions of IOL's S.M.F. ¶ 28, it did not object to, or controvert the amounts of the SIRs and products hazard aggregate limits set out therein.

B. IOL's Umbrella Insurance Policies

In addition to the SIRs and primary policies, IOL also obtained insurance from ACE. Specifically, ACE's predecessor, CIGNA Insurance Company of Canada, sold umbrella liability policy XBC 601391 to IOL, which was originally issued for the 1997 to 1998 policy period. (IOL's S.M.F. ¶ 11.) This policy was subsequently renewed for additional periods through March 31, 2003. (*Id.*) Endorsement Nos. 14, 16, 19, 21, and 23 to this Policy changed the schedule of underlying insurance for each respective policy period and Endorsement No. 17 changed the name of the insurer from CIGNA Insurance Company of Canada to ACE INA Insurance.[5] (ACE's Opp. S.M.F. ¶ 11.)

ACE also sold umbrella liability policy No. XBC 602609 to IOL for the policy period from 2003 to 2004. (IOL's S.M.F. ¶ 12.) Each of the abovementioned policies (collectively, the "ACE Policies") have annual Product Liability limits, as defined in the policies, of $3 million per occurrence and in the aggregate. (*Id.* ¶ 13.) In addition, paragraph I of the Insurance Agreement of the ACE Policies provides:

> I. **COVERAGE:**
>
> To pay on behalf of the Insured the ultimate net loss which the Insured shall be obligated to pay by reason of the liability imposed upon the Insured by law or assumed by the Insured under contract or agreement, for damages on account of:
>
> (1) personal injures
>
> (2) property damages
>
> (3) advertising liability,

[5] For the sake of clarity, the Court refers to both ACE and CIGNA Insurance Company of Canada as "ACE," unless otherwise specified.

> caused by or arising out of each occurrence happening anywhere in the world, during the policy period.

(*Id.* ¶ 14.) Paragraph II sets out the limits of liability for the ACE Policies and explains, in pertinent part, that ACE "shall only be liable for the ultimate net loss in excess of the greater of:

> (1) the limits of liability of the underlying insurance as set out in Endorsement No. 1 Schedule of Underlying Insurances in respect of each occurrence covered by the said underlying insurances, plus the applicable limits of any other underlying insurance collectible by the Insured …
>
> In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder, this policy subject to all the terms, conditions and definitions hereof shall
>
> (1) in the event of any reduction pay the excess of the reduced underlying limit.
>
> (2) in the event of exhaustion continue in force as underlying insurance …."

(*Id.* ¶ 15.) (emphasis added). Paragraph III of the ACE Policies sets out ACE's duty to defend and provides, in pertinent part, that:

> 1) In addition to the amount of ultimate net loss payable:
>
> > (A) with respect to personal injury, property damage, or advertising injury not within the terms of underlying insurance but within the terms of coverage of this insurance; or if limits of liability of the underlying insurance are exhausted because of personal injury, property damage or advertising injury, the Company will have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury, property damage or advertising injury even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient; but The Company shall not be obligated to pay any claim or judgment or to defend any suit after The Company's limit of liability has been exhausted by the payment of judgments or settlements[.]"

(*Id.* ¶ 16; ACE's Opp. S.M.F. ¶ 16.) As discussed in greater detail *infra* section II(D), the ACE Policies also contain pollution exclusions, which limit the coverage available thereunder. (*See* IOL's S.M.F. ¶¶ 20, 21; ACE's Opp. S.M.F. ¶ 21.)

C. Procedural History

In May 2010, IOL moved for partial summary judgment declaring that ACE had a duty to defend IOL in the *NH MTBE Lawsuit*, along with 57 other MTBE Complaints. *Highlands Fuel Delivery, LLC et al. v. ACE INA Ins.*, BCD-CV-09-35, at 4-5 (Dec. 30, 2011, *Nivison, J.*) (the "2011 BCD Order"). The parties, however, did not identify which of the underlying MTBE Complaints asserted which particular allegations. *Id.* at 7. As a result, the Court denied summary judgment to both parties. *Id.* at 8. The Court noted, however, "that based on the record before the Court, certain allegations in at least many of the MTBE Complaints might implicate a duty to defend" because the Court could not conclude, based on the record presented, whether the MTBE Complaints lacked allegations that fit within the "collision, overturning or upset of any railroad vehicle" exception to the pollution exclusion." *Id.* The Court left development of that factual evidence to an anticipated, subsequent motion for summary judgment. *Id.*

In March 2012, IOL filed a renewed motion for partial summary judgment on the duty to defend with an expanded statement of material facts. At the time of the Court's Order regarding this motion, it was acting on information indicating that IOL had settled all of the MTBE Complaints against it except for the *NH MTBE Lawsuit*. *Highlands Fuel Delivery, LLC et al. v. ACE INA Ins.*, BCS-CV-09-35, 2 (Jan. 7, 2013, *Nivison, J.*) (the "2013 BCD Order"). In that Order, the Court explained that because ACE had not provided "any record evidence showing the existence of additional primary or concurrent insurance policies from March 31, 1998 to

March 31, 2000, IOL has established that the only primary policy during these two policy periods was the [RSA] policy and it is exhausted." *Id.* at 4. Based on this determination, the Court addressed whether the duty to defend in the ACE Policies for 1998-2000 was triggered. *Id.* at 8-15. Following a careful analysis of the language in ACE Policy No. XBC 601391, the Court determined that the Policies were ambiguous as to whether the "underlying insurance" that must be exhausted in order to trigger the Policies' duty to defend was that referred to in the Schedule of Underlying Insurance or "any other underlying insurance collectible by the Insured." *Id.* at 12-13, 15. As a result, the Court determined that this ambiguity could not be resolved by looking at the policy language as a whole, and that the parties should have an opportunity to present extrinsic evidence to a fact finder. *Id.* at 15. The Court also determined that, under the comparison test, if the ACE Policies were triggered by exhaustion of the underlying insurance, ACE would have a duty to defend the *NH MTBE Lawsuit* because the Complaint in that action alleged instances of pollution that could fall within an exception to the pollution exclusion, and hence require a defense. *Id.* at 15-20.

IOL filed an interlocutory appeal of the 2013 BCD Order to the Law Court, arguing that the Order's failure to resolve the threshold duty to defend issue as a matter of law had effectively denied IOL its right to a defense in the *NH MTBE Lawsuit*. On May 1, 2014, the Law Court issued an opinion that dismissed the appeal because it was not from an entry of final judgment and none of the exceptions to the final judgment rule applied in light of the fact that all of the underlying MTBE lawsuits settled as of the time of the Law Court's opinion. *Irving Oil, Ltd. v. ACE INA Ins.*, 2014 ME 62, ¶¶ 9-10, 15-19, 91 A.3d 594. As discussed in greater detail *infra* section II(E), while the Law Court did not reach the merits of the parties' arguments, it stressed the importance of promptly determining whether an insurer has a duty to defend through the

comparison test, when an insured is a defendant in an active lawsuit. *See id.* ¶ 11. After this Order was issued, the *VT Lawsuit* was initiated, prompting IOL to file the present motion for partial summary judgment.

II. Discussion

A. ACE's Motions to Join Necessary and Indispensable Parties

ACE contends that RSA is an indispensable party to the present action as it provided primary coverage to IOL from at least 1999 through 2003. ACE contends that absent primary carriers, the Court cannot provide complete relief to the excess carriers or the insured because any construction of the primary policies would not be binding on the insured, the primary carriers, or the excess carriers. *See City of Littleton, Colorado v. Commercial Union Assurance Companies*, 133 F.R.D. 159, 162-163 (D. Colo. 1990); *Ins. Co. of the State of Pennsylvania v. LNC Communities II, LLC*, 2011 U.S. Dist. LEXIS 131647 (D. Colo. Aug. 23, 2011); *see also Rhone-Poulenc Inc. v. Int't Ins. Co.*, 71 F.3d 1299, 1306 (7th Cir. 1995). ACE further argues that the Plaintiffs have failed to provide substantiated evidence of RSA's exhaustion and have failed to produce evidence that they entered into settlement agreements with their primary insurers. In addition, ACE contends that, to the extent RSA believes it has fulfilled the terms of its policies or exhausted its limits, it has an interest in demonstrating that its obligations to IOL are finished. Finally, ACE argues that disposing of the present case without RSA could leave ACE and the Plaintiffs at risk of incurring double, multiple or otherwise inconsistent obligations in the event that ACE brings a separate lawsuit to adjudicate the exhaustion of RSA's limits of liability and a different result is reached.

Similarly, ACE contends that Zurich, Zurich American Insurance Company, and Royal U.S., now known as Arrowood Indemnity Company, are necessary parties as they provided

primary coverage to IOL and/or Highlands during the period of time from 1990 through 2004. ACE argues that the coverage picture for the Plaintiffs is so complex that, without the presence of their primary insurers, it is impossible to determine what coverage is provided by which insurer, and which coverage has, in fact, been exhausted.

Plaintiffs respond that: 1) the primary insurers ACE seeks to join are not "necessary" parties because complete relief can be afforded without their presence since they are not parties to the ACE Policies; 2) the primary insurers are aware of the present action, but have not claimed an "interest" therein that would be "impaired or impeded" by an adjudication in their absence; 3) the potential contribution suit ACE might file against the primary insurers is not the type of "inconsistent obligation" sought to be avoided by M.R. Civ. P. 19(a); and 4) even if the primary insurers were necessary parties, there is no evidence that they could not be joined to the present action.

M.R. Civ. P. 19 provides, in pertinent part:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest ….

Here, the Court concludes that complete relief in the present action can be afforded absent the primary insurers' joinder because the primary insurers are not privy to the ACE Policies, the primary insurers have either entered into settlement agreements with IOL regarding the MTBE Lawsuits or are providing a defense to the *VT MTBE Lawsuit*, and there is no reason ACE could not obtain the information it seeks from the primary insurers through the discovery process without joining them as parties herein.

See Aetna Cas. & Sur. Co. v. Dow Chem. Co., 44 F. Supp. 2d 870, 877 (E.D. Mich. 1999) (explaining that complete relief can be afforded parties in a coverage dispute between a policyholder and its primary and first level excess insurers absent additional excess insurers because the absent insurer is not bound by the court's interpretation of the primary policy and the "fact that insurance coverage issues may be decided one way in the primary suit and another in a later contribution action is not the type of inconsistent obligation referred to in [F.R. Civ. P.] 19"); *see also Rhone-Poulenc Inc. v. International Ins. Co*., 71 F.3d 1299, 1302 (7th Cir. Ill. 1995) ("suit against an excess insurer cannot proceed in the absence of the primary insurers until the latter have acknowledged their liability to the insured or have been determined by a court to be liable to [the insured]"). Furthermore, it is undisputed that the primary insurers have not claimed an interest that would be "impaired or impeded" by adjudication in their absence. Accordingly, the Court concludes that the primary insurers are not necessary parties to the present dispute and denies ACE's motions to join.

B. Standard of Review for IOL's Motion for Partial Summary Judgment

"Summary judgment is properly granted if the record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law." *Angell v. Hallee*, 2014 ME 72, ¶ 16, 92 A.3d 1154 (quotation omitted). "A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive. *Id.* (quotation omitted). However, a genuine issue of material fact does not exist when one version is only supported by evidence that is "merely colorable, or is not significantly probative[.]" *Bouchard v. American Orthodontics*, 661 A.2d 1143, 1144-45 (Me.

1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). Similarly, summary judgment is warranted against a party when their version of the truth is based on conjecture or speculation. *See Stanton v. Univ. of Me. Sys.*, 2001 ME 96, ¶ 6, 773 A.2d 1045. While speculation is not permitted, the nonmoving party is accorded "the full benefit of all favorable inferences that may be drawn from the facts presented." *Curtis v. Porter*, 2001 ME 158, ¶ 9, 784 A.2d 18 (quotation omitted).

Motions for summary judgment must be supported by citations to record evidence of a quality that would be admissible at trial. *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 6, 770 A.2d 653 (citing M.R. Civ. P. 56(e).) Affidavits in support of motions for summary judgment must "be made on personal knowledge" and must "show affirmatively that the affiant is competent to testify to the matters stated therein." *Platz Assocs. v. Finley*, 2009 ME 55, ¶ 16, 973 A.2d 743 (quoting M.R. Civ. P. 56(e)).

C. Governing Law and Analytic Framework for IOL's Motion for Partial Summary Judgment

Ordinarily, whether an insurer has a duty to defend in a particular case is solely a question of law. *State Farm Mut. Auto. Ins. Co. v. Montagna*, 2005 ME 68, ¶ 8, 874 A.2d 406. That determination "depends upon whether the complaint in th[e] action states facts which appear to bring the claim of damage within the policy coverage." *Marston v. Merchs. Mut. Ins. Co.*, 219 A.2d 111, 114 (Me. 1974). This determination is popularly known as the comparison test. *Mitchell v. Allstate Ins. Co.*, 2011 ME 133, ¶¶ 9-10, 36 A.3d 876. The comparison test can be complicated, however, when coverage under a particular policy is predicated upon exhaustion of another policy or policies. In this circumstance, the duty to defend determination takes on a factual component as to whether the other policy or policies have, in fact, been exhausted.

In the present case, a prerequisite to triggering the duty to defend under the ACE Policies is the exhaustion of "underlying insurance." Accordingly, in order to determine whether ACE's duty to defend has been triggered, the Court must: 1) apply the comparison test to determine whether the underlying complaints fit within the coverage of the ACE Policies; 2) determine what "underlying insurance" IOL must have exhausted before ACE's duty to defend is triggered; and 3) determine whether IOL provided sufficient information to determine that the "underlying insurance" has, in fact, been exhausted.

D. The Comparison Test Applied to the *New Hampshire* and *Vermont MTBE Complaints*

As noted, the first step in determining whether ACE's duty to defend has been triggered is to apply the comparison test to analyze whether the allegations in the *NH* and *VT Complaints* could fall within the coverage of the ACE Policies. *See Cox v. Commonwealth Land Title Ins. Co.*, 2013 ME 8, ¶ 9, 59 A.3d 1280. Maine's "comparison test arises from [the Law Court's] holding that the duty to defend is broader than the duty to indemnify, such that an insurer must provide a defense if there is any potential that facts ultimately proved could result in coverage." *Mitchell*, 2011 ME 133, ¶ 10, 36 A.3d 876 (citations omitted). Under the comparison test, the "determination of the duty to defend is based exclusively on the facts as *alleged* rather than on the facts as they actually are." *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 224 (Me. 1980) (quotation omitted) (emphasis in original). "The facts alleged in the complaint need not make out a claim that specifically and unequivocally falls within coverage." *Mitchell*, 2011 ME 133, ¶ 10, 36 A.3d 876. Instead, the duty to defend is triggered if there are "facts [that] could possibly be proved on this complaint that would bring the complaint within the policy's coverage." *Id.* ¶ 14. An insurer, however, may properly refuse to defend a policyholder if the facts that must be proved at trial in support of the allegations in the complaint could only be construed to fall

outside of the policy's coverage. *See id.* ¶¶ 13-14; *Me. Mut. Fire Ins. Co. v. Gervais*, 1998 ME 197, ¶ 7, 715 A.2d 938.

IOL bears the burden of demonstrating that the allegations come within the coverage of the ACE Policies, and ACE bears the burden of showing that an exclusion applies to preclude coverage. *Mut. Fire Ins. Co. v. Hancock*, 634 A.2d 1312, 1313 (Me. 1993). In the 2013 BCD Order, the Court determined that the allegations in the *NH Complaint* fell within the coverage of ACE Policy No. XBC 601391 for the policy years from 1998 through 2000.[6] 2013 BCD Order, 15-20.

In the present motion, IOL contends that the allegations in the *VT Complaint* are materially identical to those in the *NH Complaint* and, in light of the 2013 BCD Order, the Court should find that the allegations of the *VT Complaint* also fall within the coverage of the ACE Policies. ACE responds that the comparison test does not trigger its duty to defend in the *VT Complaint*—or the *NH Complaint*—because the *VT Complaint* is predicated on small, slow releases over a long period of time, which are plainly barred by the ACE Policies' pollution exclusions. ACE contends that the *VT* and *NH Complaints* do not even hint at a theory of property damage resulting from the kind of violent mass releases needed to fit within an exception to the pollution exclusions.

The ACE Policies provide, in pertinent part, that ACE will "have the right and duty to defend any suit against [IOL] seeking damages on account of … property damage …." (IOL's S.M.F. ¶ 16; ACE's Opp. S.M.F. ¶ 16.) "Property Damage" as used in the ACE Policies, means: (1) physical injury to or destruction of tangible property which occurs during the period of this policy, including the loss of use thereof at any time resulting therefrom; or (2) loss of use of

[6] As discussed *supra* section I(C), the 1998-1999 and 1999-2000 policy years were the only years at issue in the 2013 BCD Order.

tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the period of this policy. (IOL's S.M.F. ¶ 17; ACE's Opp. S.M.F. ¶ 17.) Property damage—or personal injury—"arising out of goods or products manufactured, sold, tested, handled or distributed by [IOL] if such use occurs after the possession of such goods or products has been relinquished to others by the Insured … and if such use occurs away from premises owned, rented, or controlled by the Insured" is defined as "product liability," provided that "such goods or products shall be deemed to include any container thereof other than a vehicle, watercraft or aircraft." (IOL's S.M.F. ¶ 19.)

However, ACE Policy No. XBC 601391 also contains a pollution exclusion which provides, in pertinent part, that the Policy "shall not apply to any claim or claims for Bodily Injury or Property Damage relating to the actual, alleged or threatened discharge, dispersal, release or escape of Pollutants." (*Id.* ¶ 20.) The pollution exclusion, however, does not "apply to any such discharge, dispersal, release or escape that results from:

1. violent breaking open or explosion of any plant, equipment or building for which the Named Insured has legal responsibility, either as owner or operator;

2. unintended fire, lightning, windstorm damages or explosion;

3. collision, overturning or upset of any vehicle or railroad vehicle."

(*Id.*) Notwithstanding the foregoing, however, ACE Policy No. XBC 601391 shall not apply to any claim or claims relating to:

a) any liability of the Insured for the actual, alleged or threatened discharge, dispersal, release or escape of Pollutants caused by any of the Insured's Products that have been discarded, dumped, abandoned or thrown away by others;

b) any liability of the Insured for the actual, alleged, or threatened discharge, dispersal, release or escape of Pollutants relating to any activities of the Insured or others on behalf of the Insured on, over or under any watercourse or body of water;

c) any liability of the Insured for the actual, alleged, or threatened discharge, dispersal, release or escape of Pollutants relating to any marine terminal, bulk plant, tank farm, refinery, underground storage tank system, oil and gas exploration, drilling, development or production operations.

(*Id.*)

ACE Policy No. XBC 602609 also contains a pollution exclusion, which provides, in pertinent part, that it "shall not apply to Personal Injury … or Property Damage … arising directly or indirectly out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

> (A) (1) At or from premises owned, rented or occupied by the Insured;
>
> (2) At or from any site or location used by or for the Insured by others for the handling storage, disposal, processing or treatment of waste;
>
> (3) Which are at any time transported, handled[,] stored, treated, disposed of, or processed as waste by or on behalf of the Insured or any person or organization for whom the Insured may be legally responsible; or
>
> (4) At or from any site or location upon the Insured or any contractors or subcontractors working directly or indirectly for or on behalf of the Insured are performing operations:
>
> (a) if the pollutants are brought on or to the site or location in connection with such operations; or
>
> (b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants;
>
> (B) Loss, costs, or expense arising out of any government direction or request that the Insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
>
> (C) Fines, penalties, punitive or exemplary damages arising directly or indirectly out of the discharge, dispersal, release or escape of any pollutants[.]"

(IOL's S.M.F. ¶ 21; ACE's Opp. S.M.F. ¶ 21.) The pollution exclusion, however, "shall not apply to any actual, alleged or threatened discharge, dispersal, release or escape of pollutants provided such discharge, dispersal, release or escape is caused by:

> (a) lightning, windstorm, earthquake and flood damage;
>
> (b) collision, turning or upset of any aircraft, mobile equipment, automobile or railroad vehicle whether owned, leased or operated by the insured or not[.]"

(*Id.*) In addition, the Policy provides that "[u]nder no circumstance shall this Exclusion apply to Products or Completed Operations Hazards." (*Id*.)

Here, the Court reaffirms its conclusion that the allegations of the *NH Complaint* fall within the coverage of ACE Policy No. XBC 601391 such that ACE had a duty to defend IOL in the *NH MTBE Lawsuit*. As discussed in greater detail in the 2013 BCD Order, the *NH Complaint* plainly sets out allegations of property damage caused by IOL. Furthermore, while the pollution exclusion to ACE Policy No. XBC 601391 appears to exclude coverage for some of the allegations in the *NH Complaint*, based on the broad construction of the duty to defend, the *NH Complaint* also sets forth allegations that reveal the potential for supporting facts to fit within an exception to the pollution exclusion, and thus within the coverage of ACE Policy No. XBC 601391.

Turning to the *VT Complaint*, it contains a number of allegations similar to those asserted in the *NH Complaint*. For example, both allege that IOL knew or reasonably should have known that MTBE would be released into the environment, causing contamination of property and water throughout the state. (*Compare* Ex. 7 to 11/12/14 McCormick Aff., the *VT Complaint* ¶ 6, *with* Ex. 5 to 11/12/14 McCormick Aff., the *NH Complaint* ¶ 6.) Similarly, both assert that IOL supplied MTBE and/or gasoline containing MTBE that was delivered into areas affecting the

state's property and waters, such that releases of MTBE contaminate and threaten the state's property and water. (*Compare VT Complaint* ¶ 17, *with NH Complaint* ¶ 14.) Furthermore, both broadly allege that MTBE reached the waters of the state through releases, leaks, overfills and spills from gasoline delivery facilities, as well as through releases, leaks, overfills and spills of gasoline from consumer activities. (*Compare VT Complaint* ¶¶ 32-33, *with NH Complaint* ¶¶ 33-34.) Both complaints also allege that some petroleum refiners began blending MTBE into gasoline in 1979, that production and use of MTBE gasoline greatly increased in the mid-1990s, and that MTBE gasoline was commingled in the distribution system such that releases could not be traced to any individual refiner. (*Compare VT Complaint* ¶¶ 40-42, 50-60, 176, *with NH Complaint* ¶¶ 56-58, 67-67, 92.) In addition, both complaints assert causes of action based on public and private nuisance, negligence, strict liability for design defect and/or defective products, and strict liability for failure to warn.[7] (*Compare VT Complaint* ¶¶ 199-220, 232-268, *with NH Complaint* ¶¶ 95-129, 139-162.)

Although the *VT Complaint* contains numerous allegations about MTBE releases stemming from small, slow releases over a long period of time, those allegations are tempered by broader assertions that IOL knew or should have known that contamination of groundwater and drinking water was inevitable due to "the long and ongoing history of nationwide gasoline spills, leaks, and other losses during distribution, sale and use." (*VT Complaint* ¶¶ 24, 71.) These references to a long and ongoing history of gasoline "spills" and "other losses," when read in light of the "broad construction of the duty to defend,"[8] distinguish the present case from *A.*

[7] The *VT Complaint* also asserts causes of action for: 1) Natural resources damages and restoration pursuant to 10 V.S.A. § 1390; 2) Violation of the Groundwater Protection Act pursuant to 10 V.S.A. § 1410; 3) Trespass; and 4) and Civil Conspiracy. (*VT Complaint* ¶¶ 178-198, 221-231, 269-278.)

[8] *See York Golf & Tennis Club*, 2004 ME 52, ¶ 8, 845 A.2d 1173.

Johnson & Co. v. Aetna Cas. & Sur. Co., in which numerous, specific factual details were alleged that "were totally inconsistent with any view that the pollution at [a particular] site was 'sudden and accidental.'" 933 F.2d 66, 72-76 (1st Cir. 1991). Accordingly, the Court determines that the *VT Complaint*, like the *NH Complaint*, contains allegations that fall within ACE Policy No. XBC 601391's coverage for releases from the violent breaking open of equipment, vehicular collisions, and unintended fire, lightning, windstorm damages or explosions. For the same reasons, the Court finds that the *VT Complaint* contains allegations that fall within ACE Policy No. XBC 602609's coverage for releases from lightning, windstorm, earthquake and flood damage, as well as vehicular collisions.

In addition, the allegations of the *VT Complaint* fall within the coverage of Policy No. XBC 602609 because they reveal the potential for property damage stemming from "product liability," which is not barred by the Policy's pollution exclusion. (*See* IOL's S.M.F. ¶ 21 (providing that "[u]nder no circumstances shall [the Pollution] Exclusion apply to Products or Completed Operations Hazards …").) Specifically, the *VT Complaint's* allegations that MTBE contaminated the environment through "releases, leaks, overfills, and spills" from gasoline delivery facilities and certain consumer activities,[9] reveals the potential for the damage to have stemmed from MTBE gasoline that was manufactured by IOL and released into the environment away from IOL's premises and after IOL relinquished control thereof.

E. What "Underlying Insurance" IOL Must Prove the Exhaustion of Before ACE's Duty to Defend is Triggered

IOL contends that the "underlying insurance" whose limits must be exhausted before ACE's duty to defend is triggered refers "only to primary policies in effect during the same

[9] *See VT Complaint* ¶¶ 33-34.

period as a given ACE Umbrella Policy."[10] IOL contends that this interpretation is supported by the plain meaning of the word "underlying" and by *Barrett Paving Materials, Inc. v. Cont'l Ins. Co.*, 488 F.3d 59 (1st Cir. 2007), which rejected an argument that an umbrella insurer did not have to defend because a primary policy from a different policy period potentially covered the suit. In the alternative, IOL argues that even if the term "underlying insurance" could be stretched to include primary coverage not in effect during the same policy period as a particular ACE Umbrella Policy, it would render the term ambiguous and, as a result, the term should be interpreted against ACE. This, IOL argues, is precisely what the Law Court specified in *Irving Oil, Ltd. v. ACE INA Ins.*, 2014 ME 62, 91 A.3d 594.

ACE responds that nothing has changed since the 2013 BCD Order, in which IOL's motion for partial summary judgment was denied, so the Court should reach the same result. In the alternative, ACE argues that the ACE Policies unambiguously require horizontal exhaustion—i.e., the exhaustion of "any other underlying insurance collectible by [IOL]"—because the reference to "underlying insurance" in the indemnity section of the ACE Policies clarifies that the term refers to all primary coverage for all triggered policy periods. ACE further argues that to the extent the Court finds the term "underlying insurance" is ambiguous, it should not construe the term against ACE because the ACE Policies were manuscript policies customized for and negotiated by IOL.

The duty to defend provision in the ACE Policies provides that, in addition to the amount of ultimate net loss payable:

[10] For example, pursuant to IOL's interpretation, the "underlying insurance" for the ACE Policy in effect from March 31, 1998 to March 31, 1999 would be the primary policy in effect from March 31, 1998 to March 31, 1999.

> (A) with respect to personal injury, property damage, or advertising injury not within the terms of underlying insurance but within the terms of coverage of this insurance; or if limits of liability of the underlying insurance are exhausted because of personal injury, property damage or advertising injury, the Company will have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury, property damage or advertising injury even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient; but The Company shall not be obligated to pay any claim or judgment or to defend any suit after The Company's limit of liability has been exhausted by the payment of judgments or settlements[.]

(IOL's S.M.F. ¶ 16; ACE's Opp. S.M.F. ¶ 16.) The indemnity provision in the ACE Policies provides:

> The Company shall only be liable for the ultimate net loss in excess of the greater of:
>
> (1) the limits of liability of the underlying insurance as set out in Endorsement No. 1 Schedule of Underlying Insurances in respect of each occurrence covered by the said underlying insurances, plus the applicable limits of any other underlying insurance collectible by the Insured, or
>
> (2) Cdn. $300,000 Ultimate Net Loss in respect of each occurrence respecting Canadian Domiciled Operations because of personal injury, property damage or advertising injury not within the terms of the coverage of the underlying insurance as set out in Endorsement No. 1 Schedule of Underlying Insurances, or
>
> (3) U.S. $25,000 Ultimate Net Loss in respect of each occurrence respecting U.S. Domiciled Operations because of personal injury, property damage or advertising injury not within the terms of the coverage of the underlying insurance as set out in Endorsement No. 1 Schedule of Underlying Insurance.
>
> and then only up to a further sum as stated in Items 3(a) and 3(c) of the Declarations in all respects of each occurrence subject to a limit as stated in Items 3(b) and 3(c) of the Declarations in the aggregate for each annual period during the currency of this Policy, separately in respect of Products and Completed Operations Liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employees of the Insured.

> In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder, this policy subject to all the terms, conditions and definitions hereof shall
>
> (1) in the event of any reduction pay the excess of the reduced underlying limit.
>
> (2) in the event of exhaustion continue in force as underlying insurance.
>
> The inclusion or addition hereunder of more than one Insured shall not operate to increase the Company's limits of liability beyond those set forth in the Declarations.

(IOL's S.M.F. ¶ 15.) Two other pertinent provisions regarding the meaning of "underlying insurance" in the ACE Policies are the "Other Insurance" clause and "Non-Concurrency Endorsement." The "Other Insurance" clause provides:

> If other valid and collectible insurance is available to the Insured covering an occurrence also covered by this policy, other than insurance that is specifically stated to be excess of this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of such other insurance.

(Exs. 1 & 2 to 11/12/14 McCormick Aff., section VIII(9) of ACE Policy No. XBC 601391 and ACE Policy No. XBC 602609). The "Non-Concurrency Endorsement" provides:

> Whereas, the period of the Primary and/or Underlying policy or policies, including renewals or replacements thereof, with respect to which this policy applies in excess is or may be non-concurrent with the period of this policy.
>
> NOW, THEREFORE, in consideration of the premium for which this policy is written, in the event of reduction or exhaustion of the aggregate limit or limits contained in such Primary and/or Underlying policy or policies solely by payment of losses in respect to accidents or occurrences during the period of such Primary and/or Underlying policy or policies, it is hereby understood and agreed that such insurances as is afforded by this policy shall apply in excess of the reduced underlying limit or, if such limit is exhausted, shall apply as Underlying Insurance, not withstanding anything to the contrary in the terms and conditions of this policy.

> Except as otherwise provided by this Endorsement all terms, provisions and conditions of this Policy shall have full force and effect.

(ACE's Opp. S.M.F. ¶¶ 36, 39.)

The 2013 BCD Order concluded that "'[u]nderlying insurance' is not a defined term in the policy, and it is used inconsistently throughout the policy." 2013 BCD Order, 12. The Order explained that, on the one hand, the ACE Policy could be read such that "the underlying insurance" refers only to the insurance identified in the schedule of underlying insurance. *Id.* at 13. This is because the Policy either: 1) specifically mentions the policy listed in the schedule of underlying insurance; 2) states "the underlying insurance;" or 3) states "the Primary and/or Underlying policy or policies" or "such Primary and/or Underlying policy or policies." *Id.* In addition, case law supported interpreting the phrase "any underlying insurance" in the indemnification provision as designed to maintain the excess nature of the ACE Policy and the general distinction between primary and excess insurance. *Id.* at 14. Furthermore, the "other insurance" clause and "non-concurrency endorsement" could be read in the same manner, i.e., maintaining the distinction between primary and excess insurance policies. *Id.* On the other hand, the 2013 BCD Order found "some merit" to ACE's argument that "underlying insurance," as used in the duty to defend section of the policy, is not limited to the policies identified on the endorsement schedule attached to the policy. *Id.* This was because in certain portions of the policy, including the paragraph defining the limits of liability, the endorsement schedule is specifically referenced. *Id.* As a result, one could conclude that when the parties intended to reference only the policies included in the endorsement, the parties specifically did so. *Id.* Since the duty to defend section did not refer to the endorsement schedule, one could conclude that the parties did not intend to limit the underlying insurance to the policies identified in the

endorsement. *Id.* at 14-15. Given this ambiguity, the 2013 BCD Order found that the "parties should be afforded the opportunity to present extrinsic evidence to a fact finder." *Id.* at 15.

As discussed *supra* section I(C), IOL filed an interlocutory appeal of the 2013 BCD Order to the Law Court, which dismissed IOL's appeal without reaching the merits. *Irving Oil, Ltd. v. ACE INA Ins.*, 2014 ME 62, ¶¶ 9-10, 15-19, 91 A.3d 594. The Law Court did, however, stress the importance of promptly determining whether an insurer has a duty to defend, when an insured is a defendant in an active lawsuit. *Id.* ¶ 11. This was because an order declining to resolve the duty to defend "deprives the insured of an insurer-provided defense in the initial stages of the action," which brings with it expertise that is frequently critical to the outcome of the suit. *Id.*[11]

The Law Court then emphasized that "the threshold for triggering an insurer's duty to defend is low" and that "[*r]egardless of extrinsic evidence*, if the complaint—read in conjunction with the policy—reveals a mere *potential* that the facts may come within the coverage, then the duty to defend exists." *Id.* ¶ 12 (emphasis in original) (quotation omitted). This emphasis indicates that the determination of what "underlying insurance" needs to be exhausted in order to trigger ACE's duty to defend must be viewed through the same lens as the comparison test. As a result, the rule of interpretation that "any ambiguity in [a] policy regarding the insurer's duty to defend is resolved against the insurer" applies. *Mitchell v. Allstate Ins. Co.*, 2011 ME 133, ¶ 11, 36 A.3d 876 (citations omitted).[12]

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[11] The Court notes that this consideration carries less force in the present circumstances because the insured will typically receive a defense from its underlying insurer until the insured is satisfied that the underlying insurer's policy is exhausted. Typically, this same evidence will be sufficient to convince the umbrella insurer that the underlying policy is exhausted.

[12] Because the Court concludes that the determination of what "underlying insurance" must be exhausted to trigger ACE's duty to defend is governed by the comparison test, the Court will not look beyond the language of the underlying complaints and the Policies into extrinsic evidence.

The "long-standing rule in Maine" for determining whether an insurance contract is ambiguous requires the contract "to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how far one clause is explained, modified, limited or controlled by the others." *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 385 (Me. 1989) (quotation omitted). In addition, "[a] provision of an insurance contract is ambiguous if it is reasonably susceptible of different interpretations or if any ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as those brought." *Travelers Indem. Co. v. Bryant*, 2012 ME 38, ¶ 9, 38 A.3d 1267 (quotation omitted).

Here, the ACE Policies are ambiguous as to what "underlying insurance" must be exhausted before the duty to defend is triggered. This is because the Policies do not define the term "underlying insurance," the duty to defend provision does not unambiguously identify what "underlying insurance" must be exhausted before the duty is triggered, and the remainder of the Policies do not clarify this ambiguity. Turning to the duty to defend provision, the Policies provide that ACE's duty may be triggered by two alternate circumstances: 1) if "any personal injury, property damage, or advertising injury not within the terms of the coverage of *underlying insurance* but within the terms of coverage of" the ACE Policies occurs; and 2) "if limits of liability of *the underlying insurance* are exhausted because of personal injury, property damage or advertising injury." (IOL's S.M.F. ¶ 16; ACE's Opp. S.M.F. ¶ 16.) (emphasis added). In neither alternative, however, do the ACE Policies clarify which "underlying insurance" they are referencing.

While the indemnification provision contains more explicit modifications of the term "underlying insurance," those modifications are not used in a uniform way that can definitively

be applied to all other uses of the term throughout the ACE Policies. The indemnification provision refers to "*the underlying insurances as set out in Endorsement No. 1 Schedule of Underlying Insurances* … plus the applicable limits of *any other underlying insurance collectible by the Insured*" in one alternative, but refers to "*the underlying insurance as set out in Endorsement No. 1 Schedule of Underlying Insurances"* in two others. (IOL's S.M.F. ¶ 15.) In addition, the indemnification provision states that "[i]n the event of reduction or exhaustion of the aggregate limits of liability under *said underlying insurance* by reason of losses paid thereunder, this policy … shall (1) in the event of any reduction pay the excess of the reduced underlying limit [or] (2) in the event of exhaustion continue in force as *underlying insurance*." (*Id.*) (emphasis added.) This differing treatment of the term "underlying insurance" is not resolved by the remainder of the ACE Policies. For example, the ACE Policies' "Other Insurance" clause could be read as supporting an interpretation under which all available primary insurance must be exhausted before ACE's duty to defend is triggered because it provides that the ACE Policies shall be in excess of other insurance available to IOL that is also covered by the ACE Policies. On the other hand, the clause could also be reasonably read as maintaining the distinction between excess and primary insurance, without weighing in upon the Policies' use of the term "underlying insurance." Similarly, the "non-concurrency" endorsement could reasonably be read in at least two ways. Under one interpretation, the endorsement could be read as extending coverage to primary policies with non-concurrent, but at least partially overlapping, policy periods.[13] Under another, the endorsement could be read as extending coverage to primary policies for any underlying insurance, regardless of when it is effective. Furthermore,

[13] For example, the entire policy period of an underlying policy in effect from January 1, 1997 to January 1, 1998, would constitute "underlying insurance" beneath an ACE Policy in effect from March 31, 1997 to March 31, 1998.

even if the Court adopted the second interpretation, another reasonable conclusion that could be drawn from the endorsement is that it makes the ACE Policies excess of *any* underlying insurance, pursuant to which ACE's duty to defend would be triggered upon the exhaustion of any underlying insurance.

Because the meaning of "underlying insurance" in the ACE Policies' duty to defend provision is ambiguous, the Court must construe that term against the insurer. As a result, the Court determines that for purposes of the comparison test, the duty to defend provisions in the ACE Policies are triggered upon exhaustion of the underlying insurance in effect during the same policy period as a given ACE Umbrella Policy.

1. *Whether the Unexhausted Non-Products Limits of IOL's Underlying Insurance Must be Exhausted Before ACE's Duty to Defend can be Triggered*

ACE also argues that if the *NH* and *VT MTBE Complaints* contain allegations broad enough to trigger ACE's duty to defend for products coverage, then the allegations also trigger the non-products coverage under the RSA and Zurich Policies, the limits of which have not been exhausted.[14] ACE asserts that if the RSA and Zurich Policies have a duty to defend any allegation in the *NH* and *VT MTBE Complaint*, then they have a duty to defend all of the allegations. In other words, ACE contends that its duty to defend is not triggered until all of the potentially triggered limits of liability of the underlying insurance are exhausted. IOL responds that because certain allegations in the *NH* and *VT MTBE Complaints* sound solely in products

[14] Specifically, ACE points to the RSA and Zurich Policies' coverage and per occurrence limits for premises operations claims and automobile liability claims. (*See* Ex. 3 to 11/12/14 McCormick Aff., Declarations, Section I (Coverage A), Section III, and Endorsement Nos. G2 and G3 of the RSA Policies; Ex. 4 to 11/12/14 McCormick Aff., Declarations, Insuring Agreements (Definitions §§ 4, 8), General Conditions (Limits of Liability), and Endorsement Nos. 4, 5, 13 and 14 to the Zurich Policies.)

liability,[15] the other coverage provided by the RSA and Zurich Policies are not implicated and ACE's duty to defend is triggered.[16]

Similar to the determination of what "underlying insurance" must be exhausted in order to trigger ACE's duty to defend, the determination of what limits of liability of the underlying insurance must be exhausted in order to trigger ACE's duty to defend must be resolved through the comparison test. *See Mitchell*, 2011 ME 133, ¶¶ 9-10, 36 A.3d 876; *State Farm Mut. Auto. Ins. Co. v. Montagna*, 2005 ME 68, ¶ 8, 874 A.2d 406; *Marston v. Merchants Mut. Ins. Co.*, 219 A.2d 111, 114 (Me. 1974). This determination requires the court to interpret any ambiguity in an insurance policy regarding the insurer's duty to defend against the insurer. *Mitchell*, 2011 ME 133, ¶ 11, 36 A.3d 876 (citations omitted).

Here, the ACE Policies are ambiguous as to whether ACE's duty to defend is triggered upon the exhaustion of *all* limits of liability of the underlying insurance or *any* limits of liability of the underlying insurance. The duty to defend provision provides, in pertinent part, that ACE's duty may be triggered by: 1) "any personal injury, property damage, or advertising injury not within the terms of the coverage of underlying insurance but within the terms of coverage of" the ACE Policies occurs; or 2) "if *limits of liability of the underlying insurance* are exhausted because of personal injury, property damage or advertising injury." (IOL's S.M.F. ¶ 16; ACE's Opp. S.M.F. ¶ 16) (emphasis added). On the one hand, the use of the plural "limits" with the singular "underlying insurance" could be interpreted as requiring all implicated limits of liability of the primary insurance to be exhausted—i.e. not just the aggregate products hazard limits—before ACE's duty to defend is triggered. On the other hand, the phrase "underlying insurance"

[15] IOL points to the causes of action for strict products liability based on design defects. (*See NH Complaint* ¶¶ 95-107; *VT Complaint* ¶¶ 244-256.)

[16] IOL also argues that the non-products coverage in the RSA and Zurich Policies do not provide coverage for the *NH* and *VT MTBE Complaints*.

could be read in the plural as referring to the multitude of underlying insurance beneath the ACE Policies. (*See e.g.* Exs. 1 and 2 to 11/12/14 McCormick Aff., Schedule of Underlying Insurance.) Under this interpretation, it would not make sense to discuss the "limit," singular, of liability for multiple underlying insurance policies. As a result, the duty to defend provision of the ACE Policies is ambiguous as to whether ACE's duty to defend is triggered by the exhaustion of all or any limits of liability of underlying insurance.

The remainder of the ACE Policies do not dispel this ambiguity. For example, Section VIII(8) of the ACE Policies provides, in pertinent part, that "[l]iability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's *underlying insurers*, shall have paid the *amounts of the underlying limits* on account of such occurrence." (Exs. 1 & 2 to 11/12/14 McCormick Aff.) (emphasis added.) While the subsection refers to "amounts of the underlying limits" in the plural, it also refers to "underlying insurers" in the plural, thereby providing no insight as to whether all or any limits of liability must be exhausted in order to trigger ACE's duty to defend. (*See also* Exs. 1 & 2 to 11/12/14 McCormick Aff., Section II: Limits of Liability (referring to "limits of liability of the underlying insurances," and discussing the "reduction or exhaustion of the aggregate limits of liability under said underlying insurance," with "underlying insurance" remaining at least ambiguous as to whether it refers to multiple underlying insurance policies); Ex. 1 to 11/12/14 McCormick Aff., Endorsement Nos. 1, 14, 16, 19, 21 "Schedule of Underlying Insurance" & "Schedule of Underlying Insurances;" Ex. 2 to 11/12/14 McCormick Aff., Endorsement No. 1 "Schedule of Underlying Insurances".(utilizing the heading "Limits of Liability" when referring to underlying insurance with multiple limits of liability as well as underlying insurance with only a single limit of liability, and utilizing the plural heading "limits of liability" in contrast to the singular heading

of "Coverage" even though some of the scheduled underlying insurance provided multiple types of coverage). Furthermore, although the "non-concurrency clause" indicates that the "insurances…afforded by" the ACE Policies apply in excess of an exhausted limit, singular, it does not definitely establish that IOL need only establish the exhaustion of any underlying limit of liability in order to trigger ACE's duty to defend. (*See* ACE's Opp. S.M.F. ¶¶ 36, 39.) Because ambiguity must be resolved against the insurer, however, the Court concludes that IOL need only establish the exhaustion of a single implicated underlying limit of liability in order to trigger ACE's duty to defend.[17] Accordingly, even if the RSA and Zurich Policies provide non-products coverage that is triggered by the *VT* and *NH MTBE Lawsuits*, it does not mean that ACE's duty to defend would not be triggered by the exhaustion of the underlying limits of liability for products hazard coverage.[18]

F. Whether the "Underlying Insurance" Policies Beneath the ACE Policies are Exhausted

IOL contends that the only underlying insurance affording coverage for the MTBE Lawsuits is the RSA Policy in effect from March 31, 1990 through March 31, 2003, and the Zurich policy, in effect from March 31, 2003 to March 31, 2004. IOL further contends that all of these policies are exhausted. ACE challenges both assertions.

[17] The one potential exception to this conclusion is if IOL purchased another underlying insurance policy offering additional limits of liability for the same risk or risks. For example, ACE's duty to defend would not be triggered for the 1997-1998 policy period based upon IOL's exhaustion of the aggregate products hazard limits for the 1997-1998 RSA Policy if IOL also obtained an additional primary insurance policy for that period providing a separate, unexhausted limit of liability for products hazards.

[18] For this reason, the Court does not address ACE's argument that there is at least a genuine issue of material fact as to whether IOL had premises or operations in the United States such that the non-products coverage in the RSA and Zurich Policies could provide coverage for the *NH* and *VT MTBE Lawsuits*.

Although Maine courts have not explicitly discussed the burden of proof regarding exhaustion of an insurance policy, the majority of courts and jurisdictions place the burden on the insured. Accordingly, at the summary judgment stage, the insured must demonstrate that there are no genuine issues of material fact that the insurance policy at issue is exhausted. *See Gen. Refractories Co. v. Allstate Ins. Co.*, 1994 U.S Dist. LEXIS 7561, *9-11 (E.D. Pa. June 8, 1994); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 135-36 (Wash. 2000); *see also Am. Guar. & Liab. Ins. Co. v. Intel Corp.*, 2010 Del. Super. LEXIS 2603, *18 (Del. Super. Ct. July 29, 2010) (applying California law); *National Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co*., 162 F.3d 821, 824, 826 (4th Cir. 1998). At least one recent case, however, has adopted a different standard. In *Sinclair Oil Corp. v. Allianz Underwriters Ins. Co.*, an Illinois Appellate Court explained that in arriving at the proper standard, it would have to balance Illinois public policy, "which places the burden on the insurer to have coverage defenses adjudicated, with the expectations of the parties to an umbrella insurance contract …." 39 N.E.3d 570, 585 (Ill. App. Ct. Apr. 7, 2015). After an examination of pertinent Illinois case law, *Sinclair* determined:

> At a minimum, the insurer must be in possession of some evidence of actual payments, made by the underlying insurance company *or the insured*, that potentially meet or exceed the aggregate limits of the underlying policy that is applicable to the claim for which the insured is seeking coverage. Once the umbrella carrier is in possession of such evidence of payments made, the burden is on the insurer to resolve any potential issues regarding exhaustion. At that point in time, if the complaint comes within the potential coverage of the excess policy, the umbrella insurer has a duty to defend the insured. Accordingly, if the umbrella carrier wishes to litigate the issue of underlying exhaustion or assert any other defense to coverage, it must defend the insured under a reservation of rights or seek a declaratory judgment.

(*Id.* at 586.) (emphasis in original). In other words, *Sinclair* placed the initial burden on the insured to present evidence of exhaustion through actual payments, and then shifted the burden to the excess or umbrella carrier who must defend under a reservation of rights until the

exhaustion question is resolved. *Id.* While the approach utilized in *Sinclair* is not without its merits, there is no indication that Maine law requires, or encourages, a deviation from the standard burden of proof formula at summary judgment. Accordingly, to prevail in the present motion, IOL must demonstrate that there are no material issues of fact that the "underlying insurance" beneath the ACE Policies are exhausted.[19]

1. *Whether the Aggregate Products Limits for IOL's Primary RSA Policies From March 31, 1998 through March 31, 2000 are Exhausted*

The 2013 BCD Order determined that the Products Hazard Limit of RSA Policy No. 25000711 was exhausted for the policy periods from 1998 to 1999 and from 1999 to 2000. 2013 BCD Order, 3-4. Stephen McCormick, the Senior Manager of Insurance and Risk for IOL since 1995, asserts that the products hazard limits for the 1998 to 1999 RSA Policy were exhausted no later than 2005 and that the products hazard limits for the 1999 to 2000 RSA Policy was exhausted no later than 2002, by payments of various product liability claims against IOL. (11/12/14 McCormick Aff. ¶ 21.) In support, Mr. McCormick points to the evidence he supplied for IOL's March 2012 renewed motion for partial summary judgment.[20] (*Id.*) (citing 3/30/12 McCormick Aff. ¶¶ 16-19 & Exs. 5-7 thereto.) Although ACE takes issue with IOL's claim of exhaustion, it has not presented any contrary evidence that the RSA Policy products hazard limits in effect from 1998 to 1999 and from 1999 to 2000 were not exhausted in 2005 and 2002, respectively. Accordingly, the Court concludes that the aggregate products hazard limits of the

[19] While an argument could be made that *Sinclair*'s approach aligns with the goal of the comparison test to promptly determine whether an insurer has a duty to defend, as discussed *supra* n. 11, the force behind that argument is reduced when determining the duty to defend of an umbrella insurer because, ordinarily, the evidence a primary insurer puts forward to prove exhaustion to its insured—and hence extinguish its duty to defend—will be sufficient to prove exhaustion to the umbrella insurer—and trigger its duty to defend.

[20] This motion was resolved in the 2013 BCD Order.

1998-1999 RSA Policy was exhausted in 2005 and the 1999-2000 RSA Policy was exhausted in 2002.

2. *Whether the Aggregate Products Limits for IOL's Primary RSA Policies from March 31, 1991 to March 31, 1992 and from March 31, 2000 through March 31, 2002 are Exhausted*

IOL asserts that the aggregate Products Hazard limits of RSA Policy No. 25000711 for the policy periods from 1991 to 1992 and from 2000 through 2002 were exhausted by payments of product liability claims unrelated to the MTBE Lawsuits. (IOL's S.M.F. ¶ 29.) In support, IOL points to a report generated by Mr. McCormick, which shows that IOL's SIRs for the policy years at issue—among others—were exhausted.[21] (11/12/14 McCormick Aff. ¶¶ 22-25 and Ex. 10 thereto.) In addition, Mr. McCormick supports his claim that the SIRs are exhausted by pointing to loss runs from IOL's internal files for the 2000 to 2001 and 2001 to 2002 policy years. (Exs. 11 & 12 to 11/12/14 McCormick Aff.) Finally, Mr. McCormick asserts that based on his experience, knowledge, and review of relevant business records, the aggregate products hazard limit of the RSA Policies from 2000 through 2002 and from 1991 to 1992 were exhausted. (11/12/14 McCormick Aff. ¶¶ 22-25.

IOL also points to the affidavit and supporting materials of Gillian Moorecroft, the Head Office Technical Director for RSA. Ms. Moorecroft asserts that the products hazard limits of the RSA Policies from 2000 through 2002 and from 1991 to 1992 were exhausted by earlier claims arising out of home heating fuel tanks that allegedly corroded, leaked, and caused property damage to IOL's residential heating fuel customers. (Moorecroft Aff. ¶ 7.) In support, she points to a summary of RSA's aggregate products liability as of July 16, 2014. (Ex. 1 to

[21] Mr. McCormick explains that while the information in IOL's records account for $479,584 toward the $500,000 SIR for the 1991-1992 policy year, he has personal knowledge based on his own recollection and the fact that RSA made payment under these policies, that IOL paid the full amount of the SIR. (11/12/14 McCormick Aff. ¶ 23.)

Moorecroft Aff., Tab 1.) She also points to loss runs regarding product claims under the RSA Policies from 1991-1992 and from 1998-2002 for non-MTBE claims. (Ex. 1 to Moorecroft Aff., Tabs 2A-2E; *see also* Ex. 3 thereto.)

ACE responds by challenging the admissibility of exhibits 10 through 12 of the 11/12/14 McCormick Aff. and exhibits 1 through 3 of Ms. Moorecroft's affidavit for lacking an adequate foundation. Specifically, ACE contends that the affidavits do not establish that the exhibits were the types of reports that were the regular practice of IOL and RSA to make. To the contrary, they contend that the exhibits were prepared for the purposes of litigation and are not admissible.

ACE further argues that contrary to IOL's assertion that the 1991-1992 RSA Policy was exhausted no later than 2005 by payments of products claims, materials submitted by RSA demonstrate that the indemnification payments made for that period were characterized as "premises operations" until July 2014. (ACE's Opp. S.M.F. ¶¶ 29, 195, 196.) In support, ACE points to an excerpt from Exhibit 3 to Ms. Moorecroft's affidavit, which demonstrates that on July 11, 2014, a payment of $1,759,111.45 was subtracted from the premises operations cause of loss and a payment of the same amount was added to the products hazard cause of loss on the same date. (Ex. S to 1/5/15 Leland Aff.) ACE argues that this change, made so late and without explanation, raises a genuine issue of fact as to the proper characterization of the claim, and the exhaustion of the aggregate products hazard limit of the 1990-1991 RSA Policy.

ACE also challenges IOL's assertion that the aggregate product limits for the 2000-2001 and 2001-2002 RSA Policies were exhausted no later than 2008 by payment of products claims. (ACE's Opp. S.M.F. ¶ 29.) Specifically, ACE points to another excerpt from Exhibit 3 to Ms. Moorecroft's affidavit, which shows products payments made under the 2000-2001 policy. (Ex. T to 1/5/15 Leland Aff.) According to the payments listed in this exhibit, the aggregate products

limit for the 2000-2001 policy was not met until October 2013. (*See id.*) ACE also points to another excerpt from Exhibit 3 to Ms. Moorecroft's affidavit, which shows product payments made under the 2001-2002 policy. (Ex. U to 1/5/15 Leland Aff.) The payments listed in this exhibit demonstrate that the aggregate products limit for the 2001-2002 policy was not met until June 8, 2012. (*See id.*)

IOL replies that ACE's evidentiary objections lack merit as Mr. McCormick and Ms. Moorecroft laid a proper foundation for the exhibits in question as summaries of business records.

To fall within the business record exception to the hearsay rule, the proponent must show that: 1) the record was made at or near the time of the transaction by a person with knowledge of the event; 2) the record was kept in the regular course of business; and 3) the business had a regular practice of making such records. *United Air Lines v. Hewins Travel Consultants*, 622 A.2d 1163, 1168 (Me. 1993). The business record exception does not require that a summary of data be kept in the regular course of business; instead, it is the underlying data that must be so kept. *Id.* at 1168-1169 (discussing *United States v. Loney*, 959 F.2d 1332, 1340-41 (5th Cir. 1992).

Here, exhibits 10 through 12 to the 11/12/14 McCormick Aff. are admissible as summaries of business records. In his affidavit, Mr. McCormick clearly lays out his involvement and personal knowledge of the data contained in the exhibits, the process by which the data was timely entered, stored, and generated, and the process through which the exhibits in question were generated. (11/12/14 McCormick Aff. ¶¶ 1-2, 22-25.) On the other hand, exhibits 1 through 3 of Ms. Moorecroft's affidavits were not properly authenticated as summaries of business records and are inadmissible hearsay. While Ms. Moorecroft's affidavit sets forth her

experience, personal knowledge, and involvement with IOL's primary policies through RSA, she does not assert that the underlying data summarized in exhibits 1 through 3 to her affidavit were made in the regular course of business in a timely manner. Ms. Moorecroft's assertion that her affidavit is based on her personal involvement with the IOL account as well as her "review of RSA's historical files" for IOL is not sufficient to establish that the historical files were made at or near the time of the transaction, by a person with knowledge, kept in the regular course of business, and that RSA was in the regular practice of making such records.

Without the supporting evidence in exhibits 1 through 3 of Ms. Moorecroft's affidavit, IOL has not presented sufficient evidence to establish that the aggregate products hazard limits of the 1991-1992 and 2000-2002 RSA Policies were exhausted. While the 11/12/14 McCormick Aff. asserts that these limits were exhausted and cites to a summary report listing the remaining products hazard limit of all the RSA Policies at issue, this evidence—without at least supporting loss runs—is not sufficient to establish exhaustion. Accordingly, the Court concludes that there are genuine issues of material fact as to whether the aggregate products hazard limits of the 1991-1992 and 2000-2002 RSA Policies were exhausted.[22]

3. *Whether the Aggregate Products Limits for IOL's Primary RSA Policies from March 31, 1990 to March 31, 1991, March 31, 1992 through March 31,1998, and March 31, 2002 to March 31,2003 are Exhausted*

IOL asserts that the aggregate Products Hazard limits of RSA Policy No. 25000711 for the policy periods from 1990-1991, 1992-1998, and 2002-2003 were exhausted in 2013 by payments of settlements in MTBE Lawsuits. In support, IOL points again to the affidavits of

[22] The Court notes that even if the exhibits to Ms. Moorecroft's exhibits were admissible, there would still be a genuine issue of material fact as to whether the 1991-1992 RSA Policy was exhausted because IOL did not offered an explanation, or supporting evidence, for the July 11, 2014 re-characterization of a $1,759,111.45 payment from a premises operation to a products hazard claim.

Mr. McCormick and Ms. Moorecroft. Mr. McCormick asserts that as of November 2008, before any of the aforementioned MTBE settlements were paid, the 1990-1991, 1992-1998, and 2002-2003 remaining (i.e., unexhausted) Products Hazard aggregate SIRs totaled $2,219,398. (11/12/14 McCormick Aff. ¶¶ 28-29.) Mr. McCormick further asserts that IOL entered into four separate settlement agreements that collectively resolved all of the then pending MTBE Lawsuits against IOL. (*Id.* ¶ 26.) In connection with these settlements, Mr. McCormick asserts that IOL and Highlands paid more than $8 million (U.S.) in defense costs, which had not been paid or reimbursed by any insurer. (*Id.* ¶ 27.) Accordingly, Mr. McCormick asserts that IOL exhausted the SIRs for those policies by allocating its unreimbursed MTBE costs as specified in a report Mr. McCormick generated based on IOL's internal claims and payment data. (*Id.* ¶ 29 and Ex. 10 thereto.)

Mr. McCormick also asserts that RSA paid a total of $9,952,207 ($10,906,376 Canadian) towards the four aforementioned settlement agreements, including a $9,365,707 ($10,201,465 Canadian) payment in settlement of the *NH MTBE Lawsuit*. (*Id.* ¶ 30.) In support, he points to a wire transfer order reflecting RSA's payment of the *NH Settlement* payment to Highlands. (*Id.* and Ex. 13 thereto.) Mr. McCormick also asserts that RSA paid its share of the other three MTBE settlements by check and that he has personal knowledge that IOL received said checks. (*Id.* ¶ 30.)

Ms. Moorecroft asserts that IOL notified RSA of the numerous MTBE Lawsuits asserted against it and requested defense and indemnity under the RSA Policies. (Moorecroft Aff. ¶ 11.) She then asserts that RSA agreed to fund shares of three MTBE settlements concluded by IOL as follows: $525,000 in November 2008 towards the *In re Methyl Tertiary Butyl Ether Products Liability Litigation*; $24,000 in February 2009 towards *City of New York v. Amerada Hess Corp.*,

No. 04-CV-3417 (SAS) (S.D.N.Y.); and $37,500 in September 2010 towards the settlement of more than a dozen filed and unfiled MTBE claims brought by Long Island-based government entities and water districts. (*Id.* ¶ 13.) Ms. Moorecroft asserts that RSA allocated the aforementioned contributions in equal amounts to the unexhausted RSA Policies in effect from January 31, 1988 to March 31, 2003. (*Id.* ¶ 14.) Ms. Moorecroft also echoes Mr. McCormick's assertion that RSA contributed $9,365,707 ($10,201,465 Canadian) towards the *NH MTBE Settlement*. (*Id.* ¶ 15.) She explains that RSA allocated its contribution to the RSA Policies in effect from March 31, 1990 to March 31, 2003, because the New Hampshire court presiding over the matter had earlier found that the State was not entitled to damages against IOL for any MTBE gasoline releases that occurred prior to 1991 because IOL did not begin blending MTBE into its gasoline until that year. (*Id.* ¶ 17; *see also* Ex. 11 to 1/19/15 McCormick Aff.)

ACE reasserts its objections to the admissibility of exhibits 1 through 3 of Ms. Moorecroft's affidavit. ACE also responds that the express and unambiguous terms of the *NH MTBE Settlement* required Highlands, not IOL, to pay the total settlement amount. (ACE Opp. S.M.F. ¶¶ 31, 176-181.) Specifically, ACE points to Paragraph 11(B) of that settlement agreement, which provides:

> Highlands Fuel Delivery, LLC shall pay the State the total sum of fifty-seven million six hundred thirty-five thousand one hundred twenty dollars ($57,635,120), which shall be termed the "Highlands Fuel Settlement Payment," in accordance with the following terms ….

(Ex. I to 1/5/15 Leland Aff.)

ACE further contends that RSA's method of allocation of its payment pursuant to the *NH Settlement* differs from what was actually required by the agreement. (ACE's Opp. S.M.F. ¶ 31, 180-184.) Specifically, ACE contends that the materials proffered by IOL and RSA show allocation of the settlement amount across the eight claimed

exhausted policy periods based upon the aggregate products liability limits for each period, with higher amounts allocated to periods with higher aggregate products limits. (*Id.*) In contrast, the *NH Settlement* required RSA to allocate the settlement amount across unexhausted policy periods based upon IOL's market share in New Hampshire. (*See* Ex. K to 1/5/15 Leland Aff. ¶ 5(a) ("[RSA] will allocate the Settlement Payment among the policies in effect between March 31, 1991 and March 31, 2003, based upon Irving Oil's market share in New Hampshire and subject to exhaustion of such Policies prior to the effective date").) ACE contends that it is unknown what the exhaustion picture would have looked like had the payments been properly allocated and, as a result, there are issues of fact as to which, if any, RSA Policies were exhausted.

IOL replies that both IOL and Highlands were named as defendants in the *NH MTBE Lawsuit*, they were alleged to be jointly and severally liable, they jointly negotiated and entered into the settlement agreement with the State of New Hampshire, and they were both released—together with their insurers, including RSA, Zurich, and ACE—upon payment of a single settlement amount to the State. (IOL's Resp. to ACE's Opp. S.M.F. ¶ 180; 1/19/15 McCormick Aff. ¶¶ 3-4, 13.) IOL explains that while the *NH Settlement Agreement* required Highlands to pay the amount, that payment was guaranteed by IOL. (Ex. 1 to 1/19/15 McCormick Aff.)

Here, ACE did not contest that the amount ($9,365,707 U.S., $10,201,465 Canadian) RSA paid towards IOL's settlement of the *NH MTBE Lawsuit* was unreasonable or not in good faith. Instead, ACE argued that per the terms of the *NH Settlement*, IOL, along with its insurers, were not required to contribute to the settlement payment at all. While ACE is correct that the *NH Settlement Agreeme*nt provides that

Highlands shall pay the settlement payment, it ignores the fact that IOL guaranteed the payments made by Highlands and that the entire agreement was intended to settle liability for Highlands *and* IOL. (Ex. 1 to 1/19/15 McCormick Aff.) Viewing the evidence in the light most favorable to ACE and drawing all reasonable inferences in ACE's favor, the Court concludes that when the *NH Settlement Agreement* is read as a whole, and the agreement is viewed in the context of the settlement payments actually made by and on behalf of IOL, no reasonable jury could conclude that only Highlands was obligated to pay the *NH MTBE Settlement* payment.

Furthermore, while ACE contends that RSA's *NH Settlement* payment was not allocated in accord with the terms of its settlement agreement with IOL, it is clear that the payment was allocated throughout policy periods to the extent RSA believed they remained unexhausted. While ACE has raised questions as to whether the RSA Policies that were not involved in the four MTBE settlement agreements were properly exhausted, there is no evidence—nor has ACE alleged—that IOL or RSA allocated the *NH Settlement* payment in bad faith. *See, e.g.*, *In re E. 51st St. Crane Collapse Litig.*, 103 A.D.3d 401, 403-04 (N.Y. App. Div. 2013) (determining that an underlying insurer's payment of a good-faith settlement with the insured for the underlying policy's applicable limit exhausted the policy); *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 2014 Conn. Super. LEXIS 699, *68 (Mar. 28, 2014) (refusing to reallocate indemnity payments "already made and done" because the method utilized was objectively reasonable at the time and made in good faith); *see also U.S. Fid. & Guar. Co. v. Treadwell Corp.*, 58 F. Supp. 2d 77, 107 (S.D.N.Y. 1999) ("treating a primary insurer's settlement with an insured as binding for allocation purposes, at least in the absence of

evidence of collusion to defraud an excess insurer, furthers the strong public interest in promoting settlement").

However, as discussed *supra* section II(F)(2), exhibits 1 to 3 of Ms. Moorecroft's affidavit are inadmissible hearsay. Absent the supporting evidence contained therein, IOL has not presented sufficient evidence regarding the three MTBE settlement payments—excluding the *NH Settlement*. Specifically, the 11/12/14 McCormick Aff. does not provide sufficient evidence because it only contains Mr. McCormick's assertion of payment without any supporting evidence beyond a summary report listing the remaining products hazard limit of the pertinent RSA Policies. Similarly, although Ms. Moorecroft breaks down RSA's share of the three MTBE settlement payments, her affidavit does not contain any admissible supporting evidence. Without sufficient evidence of these payments, the Court cannot conclude that they were made or properly allocated to the aggregate products hazard limits of the RSA Policies. Because proof of these three settlement agreements are essential to proving the exhaustion of the aggregate products hazard limits of the 1990-1991, 1992-1998, and 2002-2003 RSA Policies, the Court concludes that there are genuine issues of material fact as to exhaustion.

4. *Whether the Aggregate Products Limits for IOL's Primary Zurich Policy in Effect from March 31, 2003 to March 31, 2004 is Exhausted*

IOL contends that Zurich Policy No. 8831516, in effect from March 31, 2003 to March 31, 2004, included an aggregate limit of $1,000,000 for Products Hazard claims. (11/12/14 McCormick Aff. ¶ 31.) IOL further contends that Zurich paid the $1,000,000 limit of this policy towards the settlement of the *NH MTBE Lawsuit* in 2013. (*Id.*) In support, Mr. McCormick points to a copy of a check for $1,000,000 IOL received from Zurich in contribution to the settlement and a loss run from IOL's internal files showing payments made. (*Id.* and Exs. 14 &

15 thereto.) ACE reasserts its argument that Zurich's products hazard limit is not exhausted because it was not obligated to pay anything under the *NH Settlement Agreement.* (ACE's Opp. S.M.F. ¶ 32.)

For the reasons discussed *supra* section II(F)(3), the Court determines that no reasonable jury could find that IOL was not bound to contribute under the *NH Settlement Agreement* or that Zurich's payment thereunder was reasonable. Accordingly, the Court concludes that the aggregate products hazard limit of Zurich's policy is exhausted.

5. *Whether IOL Obtained Additional Primary Insurance from Royal U.S.*

ACE contends that IOL has not established vertical exhaustion for the policy years from 1996 through 1998 and from 1999 through 2003 because there is at least a genuine issue of material fact as to whether IOL, in addition to the RSA Primary Policies, was also covered by a primary policy issued by Royal Insurance Company of America ("Royal U.S.").[23] In support, ACE points out that IOL is specifically listed as a named insured in an endorsement to the Royal U.S. Policy from March 31, 1996 to March 31, 1997 and March 31, 1997 to March 31, 1998. (Exs. L & M to 1/5/15 Leland Aff.) In addition, ACE contends that IOL is also covered under the Royal U.S. primary policies for the policy years from March 31, 1999 through March 31, 2003 because it fits within the broad definition of the "Named Insured Endorsement." The Endorsement defines the Named Insured as follows:

> IT IS AGREED THAT NAMED INSURED SHOULD READ AS FOLLOWS:
>
> THE IRVING COMPANIES ET AL AS MORE FULLY DESCRIBED IN ENDORSEMENT A ATTACHED BEING ANY AND ALL PART AND/OR SUBSIDIARY AND/OR CONTROLLED CORPORATIONS OR ENTITIES

[23] The Royal U.S. Policy for the years at issue is a Comprehensive General Liability Policy with annual aggregate limits of coverage of $2,000,000, as well as $2,000,000 in coverage for "products/completed operations." (ACE's Opp. S.M.F. ¶¶ 187-189, 192-194; Exs. L-Q to 1/5/15 Leland Aff.)

> WHICH IS OR ARE DIRECTLY OR INDIRECTLY CONTROLLED (THROUGH OWNERSHIP OF MORE THAN FIFTY (50) PERCENT OF THE VOTING STOCK, BY CONTRACT OF ARRANGEMENT, OR OTHERWISE) BY ANY MEMBER OR MEMBERS OF THE IRVING FAMILY, OR TRUSTS OR OTHER FIDUCIARY ENTITIES ESTABLISHED FOR THE BENEFIT OF ANY MEMBER OR MEMBERS OF THE IRVING FAMILY. "THE IRVING FAMILY" MEANS ALL OF THE LINEAL DESCENDANTS OF MR. K.C. IRVING AND THE SPOUSES OF SUCH DESCENDANTS.

(Exs. N-Q to Leland Aff., Endorsement C.[24]) The "Endorsement A" referenced in the above-mentioned policies, provide that the named insured is amended to include a number of different Irving entities. (*Id.*, Endorsement A.) Notably absent from the list, however, is IOL.[25] (*Id.*)

IOL responds that the inclusion of IOL as a named insured in the 1996 through 1998 Royal U.S. primary policies was a drafting error. (1/19/15 McCormick Aff. ¶ 6.) In support, IOL points to copies of the named insured endorsements from the Royal U.S. primary policies for the policy years from March 31, 1990 through March 31, 1996 and March 31, 1998 through March 31, 2003, in which IOL is not explicitly listed as a named insured. (Ex. 3 to 1/19/15 McCormick Aff.) Furthermore, IOL points to copies of endorsements from RSA's primary policies, which provide, in pertinent part, that the coverage afforded by the RSA primary CGL policy "excludes the following Companies, "VARIOUS IRVING COMPANIES INSURED UNDER POLICY NOS. R1W519641, R1W519651, R1W519621 AND RIA519631 AND ANY RENEWAL OR REPLACEMENT THEREOF ISSUED BY THE ROYAL INSURANCE COMPANY OF AMERICA …." (Ex. 4 to 1/19/15 McCormick Aff., Bates Nos.

[24] Endorsement C to the March 31, 1999 to March 31, 2000 Royal U.S. Policy contains minor typos, that are absent from subsequent endorsements. (Ex. N to 1/5/15 Leland Aff. Endorsement C.)

[25] ACE does not contend that Royal U.S. issued a primary policy to IOL providing coverage for the policy year from March 31, 1998 to March 31, 1999.

IRVINGS0001402, IRVINS0001575, IRVINGS0002603.[26]) This evidence, however, is of limited utility because IOL did not explicitly demonstrate that the Royal U.S. Policies ACE cites to are those excluded from coverage by the endorsements to the RSA Policies. Indeed, the Royal U.S. Policies that ACE points to do not appear to share the same policy numbers as those listed in the endorsements. (*Compare* Exs. L & M to Leland Aff., *with* Ex. 3 to 1/19/15 McCormick Aff.)

IOL also argues that the Schedule of Underlying Insurances in ACE Policy No. XBC 601391 lists a primary CGL policy issued to IOL by RSA, and a separate CGL policy issued to Irving Oil Corporation—the predecessor of Highlands— "by Royal Insurance Company," a Delaware corporation licensed in all fifty states. (Ex. 1 to 12/11/14 McCormick Aff.) In other words, the Schedule of Underlying Insurance indicates that Irving Oil Corporation, not IOL, obtained coverage from Royal Insurance Company, i.e., Royal U.S. Mr. McCormick also asserts that he has personal knowledge that ACE is well aware that IOL and Highlands have separate and non-overlapping primary CGL insurance programs. (1/19/15 McCormick Aff. ¶ 5.)

In a supplemental filing, ACE also points to a number of communications written on behalf of the "Irving Oil Defendants," which include Irving Oil Corporation, IOL, and Irving Oil Terminals, Inc., to Royal U.S. seeking and/or discussing coverage under certain enumerated policies. (Exs. A-H to 6/5/15 Leland Aff.)

Here, viewing the evidence in the light most favorable to ACE, there are genuine issues of material fact as to whether the 1996-1998 and 1999-2003 Royal U.S. Policies provide coverage to IOL that must be exhausted before ACE's duty to defend can be triggered. While it

[26] The RSA Policy in effect from March 31, 1990 to March 31, 1991 contains analogous language, but refers to "THE ROYAL INSURANCE COMPANY," as opposed to "THE ROYAL INSURANCE COMPANY OF AMERICA." (*Id.* at IRVINS002603.)

seems unlikely that IOL would procure two different primary policies governing essentially the same risks—especially considering that the Royal U.S. Policy is listed in the Schedule of Underlying Insurance as covering Irving Oil Corporation—the fact that the 1996-1998 Royal U.S. Policies explicitly list IOL as a named insured at least creates a genuine issue of material fact as to whether IOL is covered under that policy.[27]

Similarly, viewing the evidence in the light most favorable to ACE, the broad definition in the Named Insured Endorsements of the 1999-2003 Royal U.S. Policies create genuine issues of material fact as to whether IOL is afforded coverage thereunder. Specifically, the Endorsement provides that the named insured includes "any and all part and/or subsidiary and/or controlled corporations or entities which is or are directly or indirectly controlled … by any member or members of the Irving Family," which is defined to include all of the lineal descendants of Mr. K.C. Irving and the spouses of such descendants. (ACE's Opp. S.M.F. ¶ 190.) While the Named Insured Endorsement could be read as limited to the Irving Companies "as more fully described in Endorsement A," given the broader language regarding the "Irving Family" and the duty to view the evidence in the light most favorable to ACE, the Court concludes that there is a genuine issue of material fact as to whether IOL is a named insured, and hence covered by, the 1999-2003 Royal U.S. Policies.

III. Conclusion

For the Reasons discussed, it is hereby ORDERED AND ADJUDGED AS FOLLOWS:

1) The Court DENIES ACE's motion to join RSA as a necessary and indispensable party to the present action;

[27] The Court does not find the communications written on behalf of the "Irving Oil Defendants" as persuasive evidence indicating coverage for IOL under the Royal U.S. Policies because both IOL and Irving Oil Corporation—now Highlands—are represented by the same counsel, and the letters broadly sought coverage from Royal U.S. on behalf of the "Irving Oil Defendants."

2) The Court DENIES ACE's motion to join additional primary insurers as necessary and indispensable parties to the present action;

3) The *NH* and *VT MTBE Complaints* contain allegations that fall within the coverage of ACE Policy No. XBC 601391 and ACE Policy No. XBC 602609;

4) The "underlying insurance" IOL must prove the exhaustion of before ACE's duty to defend is triggered under the above-mentioned policies refers to underlying insurance policies in effect during the same policy period as a given ACE Umbrella Policy;

5) In order to trigger ACE's duty to defend, IOL must at least prove the exhaustion of a limit of liability for one particular type of coverage provided by underlying insurance. However, if IOL purchased duplicative underlying insurance, it must prove the exhaustion of all underlying limits of liability covering the same risk or risks;

6) There are no genuine issues of material fact that IOL exhausted the aggregate products hazard limits for the primary insurance it obtained from RSA for the policy periods from March 31, 1998 through March 31, 2000;

7) There are no genuine issues of material fact that IOL exhausted the aggregate products hazard limit for the primary insurance it obtained from Zurich for the policy period from March 31, 2003 to March 31, 2004;

8) There are genuine issue of material fact as to whether IOL exhausted the aggregate products hazard limit for the primary insurance it obtained from RSA for the policy periods from March 31, 1990 through March 31, 1998 and from March 31, 2000 through March 31, 2003.;

9) There is a genuine issue of material fact as to whether IOL purchased duplicative underlying insurance offering additional products hazard limits through Royal U.S. for the policy

periods from March 31, 1996 through March 31, 1998 and from March 31, 1999 through March 31, 2003;

10) ACE has a duty to defend IOL in the *VT MTBE Lawsuit* under ACE Policy No. XBC 601391 for the policy period from March 31, 1998 to March 31, 1999 because IOL exhausted the aggregate products hazard limit for all underlying insurance in 2005;

11) ACE had a duty to defend IOL during at least part of the pendency of the *NH MTBE Lawsuit* under ACE Policy No. XBC 601391 for the policy period from March 31, 1998 to March 31, 1999 because IOL exhausted the aggregate products hazard limit for all underlying insurance in 2005; and

12) ACE has a duty to defend IOL in the *VT MTBE Lawsuit* under ACE Policy No. XBC 602609 for the policy period from March 31, 2003 to March 31, 2004 because IOL exhausted the aggregate products hazard limit for all underlying insurance in 2012.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: February 9, 2016

_____/s_____
Michaela Murphy
Justice, Business & Consumer Court