IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Clark Equipment Company, et al., Plaintiffs, vs. Liberty Mutual Insurance Company, et al., Defendants.	**File No. 09-09-C-02026** **MEMORANDUM OPINION AND ORDER**

The above-entitled matter comes before the Court upon Clark Equipment Company's (Clark's), United States Fire Insurance Company's (US Fire's) and Liberty Mutual Insurance Company's (Liberty Mutual's) Motions for Partial Summary Judgment. Clark argues that an excess insurance policy issued by US Fire provides coverage to them for asbestos claims once the stated underlying policy in the policy is exhausted. Liberty Mutual joins in that argument. US Fire, however, argues that it has no obligation to pay under the terms of its policy, until all policies issued to Clark from 1957 to 1986 are exhausted.

Summary judgment is a procedural device for promptly disposing of a lawsuit or issues in a lawsuit without a trial if there are no genuine issues of material fact or inferences which can be reasonably drawn from undisputed facts or if the only issues to be resolved are questions of law. Riverside Park Condominiums Unit Owners Ass'n. v. Lucas, 2005 ND 26, ¶ 8, 691 N.W.2d 862. Interpretation of a written contract of insurance is a question of law for the Court for which summary judgment is an appropriate method of disposition. Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W.2d 136 (N.D. 1991). All material facts which are necessary to resolve this matter have been stipulated by the parties in a stipulation of uncontested facts.

Clark currently faces many asbestos related bodily injury claims arising from its products. From 1957 to 1979, Clark has been insured by various Liberty Mutual policies. From 1979 to 1986, Insurance Company of North America provided insurance to Clark (INA).

All of these policies have not been exhausted. For a period of time from September 30, 1971, to September 30, 1974, Clark was insured by US Fire on an excess basis. Only one general liability Liberty Mutual policy, which provides coverage for asbestos claims, is listed on the schedule of underlying policies. During the three year period of the US Fire policy, three different Liberty Mutual policies were in force, and everyone agrees that all three of those policies have been exhausted in payment of claims.

As stated earlier, Clark argues that the US Fire policy only requires what is commonly called "vertical" exhaustion, i.e., those policies which have the same policy periods as the policy period of the excess policy. US Fire, on the other hand, argues that the policy calls for "horizontal" exhaustion, i.e., requiring exhaustion of all policies providing coverage to Clark from 1957 to 1986.

The parties agree that Michigan law controls this controversy. Insurance policies, under Michigan law, are interpreted in accordance with the principles of contract interpretation. Auto Owner's Ins. Co. v. Martin, 773 N.W.2d 29, 33 (Mich. Ct. App. 2009).

US Fire, in its argument for requiring horizontal exhaustion, relies upon the following provisions in the policy:

> **I COVERAGE --**
>
> The Company agrees to indemnify the insured for ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability imposed upon the insured by law, or assumed by the insured under contract.
>
> . . .
>
> **V RETAINED LIMIT -- LIMIT OF LIABILITY --**
>
> With respect to Coverage I (a), I (b) or I (c), or any combination thereof, the company's liability shall be only for the ultimate net loss in excess of the insured's retained limit defined as the greater of:

(a) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other underlying insurance collectible by the insured; or

(b) an amount as stated in Item 4(C) of the declarations as the result of any one occurrence not covered by the said policies or insurance;

and then up to an amount not exceeding the amount as stated in Item 4(A) of the declarations as the result of any one occurrence. There is no limit to the number of occurrences during the policy period for which claims may be made, except that the liability of the company arising out of the products hazard on account of all occurrences during each policy year shall not exceed the aggregate amount stated in Item 4(B) of the declarations.

. . .

D. Other Definitions.

. . .

(d) Occurrence. With respect to Coverage I (a) and I (b) "occurrence" means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to persons or tangible property during the policy period. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

. . .

J. Other Insurance. If other collectible insurance with any other insurer is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of, and not contribute with, such other insurance. If the insured carries other insurance with the company covering a loss also covered by this policy (other than underlying insurance of which the insurance afforded by this policy is in excess) the insured must elect which policy shall apply and the company shall be liable under the policy so elected and shall not be liable under any other policy.

US Fire argues that the Michigan Courts have found language similar to that contained in US Fire policies here, to clearly and unambiguously preclude coverage for a loss until all available underlying insurance, i.e., horizontal exhaustion has occurred. US Fire relies upon Geerdes v. St. Paul Fire & Marine Co., 341 N.W.2d 195 (Mich. Ct. App. 1983) for that proposition. That reliance, however, is misplaced. Gleaned from that decision, is the fact that

Thomas Steele's $50,000 policy and his father's $300,000 policy, that also covered Mr. Steele, had the same policy period as the St. Paul Fire umbrella policy. Geerdes never addressed whether other underlying policies could include policies outside of the policy period of the umbrella policy.

US Fire also relies upon the unpublished decision of the Michigan Court of Appeals in Dow Corning Corp. v. Cont'l Cas. Co., Inc., 1999 Westlaw 33435067. In discussing the exhaustion issue, the Court stated as follows:

> Defendants also maintain that excess insurer should not have to pay until all triggered primary and lower-level excess policies have been exhausted. As an example, if a particular claimant suffered injuries continuously between 1970 and 1980, defendants argue that no excess insurer should be liable for that claim until all primary policies with policy periods between 1970 and 1980 are exhausted. The parties in other courts have named this method "horizontal exhaustion." On the other hand, Dow Corning argues that an excess insurer becomes potentially liable as soon as the policies "directly below" (i.e., in the same policy) are exhausted. This method has been termed "vertical exhaustion." The trial court agreed with Dow Corning and, relying on cases from other jurisdictions stated that "[t]he other insurance" clause can only be reasonably interpreted to mean that other insurance must pay first *if it provides coverage in the same policy period.*
>
> [Emphasis added].
>
> For their part, defendants rely on the "other insurance" clause in their policy, which states:
>
> > If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by 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 other insurance.
>
> This language clearly support defendant's argument, since any triggered primary or lower-level excess policies constitute "other valid and collectible insurance . . . covering a loss also covered by this policy."

It is clear that in Dow Corning, the Court was relying solely on the "other insurance" clause in the policy to reach the conclusion that it did. Because of this, the decision is not persuasive, especially in light of Arco Indus. Corp. v. Am. Motorists Ins. Co., 594 N.W.2d 61 (Mich. Ct. App. 1998). Arco dealt with contamination of ground water by continuous seepage of a lagoon. Therefore, Arco was dealing with continuous injury over several policy periods similar to the breast implant injury in the Dow case. The Court, in Arco, stated as follows:

> "Other insurance" clauses do not provide a solution to the allocation problem here because they were not meant to allocate liability among successive insurers. . . . Rather, they relate to the effect of concurrent coverages of a single occurrence. . . . They are individual contractual agreements between the insured and the insurer designed to prevent the insured from recovering multiple times for an injury that occurs at one point in time. . . . Because this case involves consecutive policies covering different policy periods, we conclude that the "other insurance" clauses have no application.

Id. at 70.

The Court then is left with construing the insurance contract to resolve this issue. An insurance policy is a contract that should be read as a whole to determine what the parties intended to agree on. McKusick v. Traveler's Indem. Co., 632 N.W.2d 525, 528 (Mich. Ct. App. 2001). As stated earlier, the policy provides that the insurer's liability will be only for the ultimate net loss in excess of the insured's retained limit, which is defined as: "The total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other underlying insurance collectible by the insured. . . ." (Emphasis added). Clark argues that the word "underlying" in that language cannot be construed to allow for horizontal exhaustion. The word "underlying" is not defined in the policy. The fact that an insurance policy does not define a relevant term does not render the policy ambiguous. Morinelli v. Provident Life & Accident Ins. Co., 617 N.W.2d 777, 781 (Mich. Ct. App. 2000). Rather, undefined terms of an insurance policy are given their commonly used meanings.

Twichel v. MIC Gen. Ins. Corp., 676 N.W.2d 616, 622 (Mich. 2004). Reference to a dictionary definition of an undefined term is appropriate to determine its commonly understood meaning. Id. at 622. "Underlying" is defined as "lying under or beneath." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2489 (1993). Using this commonly understood meaning of "underlying" supports Clark's position that "underlying insurance" includes only those policies that are beneath or under its policy, i.e., having the same policy period. The "other insurance" clause does not use the word "underlying," but as the Court has indicated earlier, Arco made clear that "other insurance" clauses have no applicability in continuous injury cases.

Clark also relies upon the following language under Section V, RETAINED LIMIT -- LIMIT OF LIABILITY, which states as follows:

> In the event of the reduction or exhaustion of the aggregate limits of liability of the underlying policies listed in Schedule A by reason of losses paid thereunder, this policy, subject to the above limitations, (1) in the event of reduction, shall pay the excess of the reduced underlying limits; or (2) in the event of exhaustion, shall continue in force as underlying insurance.

Clark argues that this language suggests that the intent of the policy is to require exhaustion only of the scheduled policies, or other vertical policies. "An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." Royal Prop. Group, LLC. v. Prime Ins. Syndicate, Inc., 706 N.W.2d 426, 432 (Mich. Ct. App. 2005). What this provision does is render support for Clark's interpretation of the word "underlying" in the earlier language of the retain limit language. The use of the same word "underlying," in this latter language, is certainly referring to the policy listed in Schedule A, which clearly supports a vertical exhaustion requirement, as opposed to a horizontal exhaustion.

Reading this insurance policy, as a whole, to effectuate the overall intent of the parties, which this Court is required to do, See Pac. Employer's Ins. Co. v. Michigan Mut. Ins. Co., 549

N.W.2d 872, 875 (Mich. 1996), the Court concludes that US Fire's excess policy requires only vertical exhaustion, i.e., exhaustion of those underlying policies having a policy period within the policy period of the excess policy.

On the basis of the foregoing, **IT IS HEREBY ORDERED** that Clark's Motion for Partial Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that Liberty Mutual's Motion for Partial Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that US Fire's Motion for Partial Summary Judgment is **DENIED**.

Dated this 10th day of December, 2010.

BY THE COURT:

Steven L. Marquart
Judge of the District Court

STATE OF NORTH DAKOTA } AFFIDAVIT OF SERVICE BY MAIL
}
COUNTY OF CASS } File No. 09-09-C-02026

Vicky Matthys, being first duly sworn on oath, does depose and say: She is a resident of the City of Harwood, North Dakota, of legal age, and not a party to the above-entitled matter.

On the 10 day of December, 2010, affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents:

MEMORANDUM OPINION
AND ORDER

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

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To the best of affiant's knowledge, the address given was the actual post office address of the party intended to be so served.

Vicky Matthys

Subscribed and sworn to before me this 10th day of December, 2010.

(SEAL)

Notary Public, Cass County, ND

ROGER L. MJONES
Notary Public
State of North Dakota
My Commission Expires June 24, 2011