IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEUTSCHE BANK TRUST COMPANY AMERICAS, TAUNUS CORPORATION, DEUTSCHE BANK TRUST CORPORATION, DB PRIVATE CLIENTS CORPORATION, AND DBAB WALL STREET LLC	)	
Plaintiffs,	)	
v.	)	C.A. No. 06C-09-261 JAP
ROYAL SURPLUS LINES INSURANCE COMPANY, LANDMARK AMERICAN INSURANCE COMPANY, AND COMMERCE AND INDUSTRY INSURANCE COMPANY	)	
Defendants.	)	

REVISED OPINION
AFTER MOTIONS FOR REARGUMENT

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I. INTRODUCTION

At 9:59 a.m. on September 11 the South Tower of the World Trade Center collapsed in ten seconds,[1] falling into a building located adjacent to the World Trade Center at 130 Liberty Street (the "Liberty Street site") which was owned by Deutsche Bank Trust Company Americas ("DBTCA"), a Deutsche Bank entity and one of the instant plaintiffs. Another building owned by DBTCA, located one block to the south at 4 Albany Street (the "Albany Street site"), was also severely damaged by the collapse of the South Tower. Twenty-eight minutes later[2] the North Tower collapsed, causing yet more damage to both the Liberty Street and Albany Street sites. Not surprisingly, environmental hazards abounded in the wreckage. Scores of workers participating in the clean-up of the aftermath of the attacks eventually filed suit against Deutsche Bank and others alleging a wide variety of injuries resulting from their participation in those efforts. In this declaratory judgment action the Court is asked to determine which of the defendant insurance carriers has a duty to defend the Deutsche Bank entities in these suits.

A word or two about nomenclature is useful here. All of the instant plaintiffs have been sued by one or more of the allegedly injured clean-up workers, although in almost all cases the workers' complaints

[1] The 9/11 Commission Report, 305.
[2] *Id.* at 311.

have been amended to name DBTCA, the owner, as the defendant. The court will generally use the term "Deutsche Bank" to refer to any or all of these entities. In some instances, however, more precision is required, particularly when discussing ownership of the damaged buildings (DBTCA) and when discussing a construction management contract executed by another Deutsche Bank entity (Deutsche Bank AG). On those occasions the court will identify the specific entity involved.

II. FACTS

A. The Clean-Up Begins and Deutsche Bank Obtains Insurance

After the attacks Deutsche Bank explored alternatives including restoring its buildings or demolishing them. As part of that effort Deutsche Bank AG contracted with Tishman Interiors Corporation to act as an advisor and project manager. Consultation with Tishman and others led Deutsche Bank to abandon any hope of restoring its buildings.

The clean-up process was complex, requiring Deutsche Bank and other affected property owners to retain multiple contractors skilled in different trades. Tishman, as project manager, secured the necessary contractors for Deutsche Bank. One of the principal contractors was PAL Environmental Safety Corporation ("PAL"). In late 2001 Tishman, on behalf of Deutsche Bank, entered into a contract with PAL to perform

clean-up services at the sites. (Defendant C&I disputes that Tishman entered into this contract "on behalf of" Deutsche Bank. The court's analysis does not require it to resolve this dispute). PAL began work on the sites in November, 2001 and continued through the end of the clean-up. The Liberty Street site was sold to the Lower Manhattan Development Corporation in August, 2004, and the Albany Street site was deconstructed and later sold in August, 2005.

In its contract with Deutsche Bank, PAL agreed to add Deutsche Bank AG and its affiliates as an additional named insured under PAL's commercial general liability ("CGL") insurance policies. PAL was obligated to obtain policies with a combined bodily injury and property damage limit of at least $10 million, and to maintain coverage "until all the obligations under [the contracts] are fulfilled." PAL, which already had CGL insurance, purchased the required insurance in a series of primary and umbrella policies from Defendant Commerce and Industry Insurance Company ("C&I").

Deutsche Bank itself purchased a series of primary and excess policies from Royal Surplus Lines Insurance Company ("Royal") and Royal's affiliate, Landmark Insurance ("Landmark").[3] The Royal policies covered the Liberty Street site (but not the Albany Street site) from January 1, 2002 through December, 2003. The Landmark policies covered the period December 1, 2003 through August 15, 2005. At first

[3] Royal and Landmark are represented by the same counsel.

the Landmark policies covered only the Liberty Street site, but an endorsement effective October 24, 2004 extended the Landmark coverage to the Albany Street site.

B. The Clean-Up Workers' Suits

Given the enormity of the clean-up and the presence of toxic substances in the wreckage, it is not surprising that at least some workers in the clean-up process claimed they became ill as a result of their exposure to toxins at the various clean-up sites. Congress anticipated this possibility when it enacted the Air Transportation Safety and Systems Stabilization Act, and it granted exclusive jurisdiction over clean-up workers' suits to the United State District Court for the Southern District of New York.[4]

1. Judicial Administration of the Suits

The District Court maintains three dockets for these suits: 21 MC 100 is for suits in which the plaintiff contends he or she was injured while working in the immediate vicinity of the World Trade Center site; 21 MC 102 is for those who have claimed to have been injured at sites other than the World Trade Center; and 21 MC 103 is for plaintiffs who claim they were injured at both. The District Court ordered the filing of a Master Complaint in 21 MC 102 which is deemed to apply to all plaintiffs

[4] Air Transportation Safety and Systems Stabilization Act, 49 U.S.C. §40101, *et seq.*

in that docket. The court's case management order provided for "check-off complaints" in which plaintiffs provide more specific information about their claims including the identity of the defendants, the universe of which is listed in the check-off complaints. There is no Master Complaint in the 21 MC 103 docket, but cases in that docket use check-off complaints.

In October, 2005 the first suits were filed against Deutsche Bank relating to the Liberty Street site; the first Albany Street site suit was not filed until February of the following year. Thirty of the plaintiff workers in the suits against Deutsche Bank were employed exclusively by PAL; another 130 were employed at various times throughout the clean-up by PAL as well as other contractors; and still another 130 were never employed by PAL.[5] All but two of the 290 suits are in the 21 MC 102 or 103 dockets.

2. The Allegations in the Clean-Up Workers' Suits

In New York, as in Delaware, an insurance carrier's duty to defend is dependent on the allegations in the underlying complaint. It is therefore necessary to consider the allegations in the amended Master Complaint in the 21 MC 102 docket as well as the allegations in the check-off complaints in all three dockets.

[5] Two complaints were filed by workers at Deutsche Bank sites other than the Liberty Street and Albany Street sites. Deutsche Bank does not presently seek coverage for those two suits.

a. *The Master Complaint*

The Master Complaint is a one-size-fits-all pleading containing a broad spectrum of claims. It begins with an allegation that the worker-plaintiff participated in clean-up, construction, demolition or repair at sites specified in the check-off complaint. Next are allegations that Deutsche Bank failed to keep work sites safe and in a suitable condition, with several more specific allegations (e.g. failing to properly monitor air quality). The Master Complaint alleges that as a result of Deutsche Bank's conduct the worker-plaintiff came in contact with "toxins, contaminants, and other harmful products" that caused injury to worker-plaintiff. Several causes of action are set forth in the Master Complaint, including violations of New York's labor law and common law negligence theories.[6] The prayers for relief set out claims for compensatory damages (20 million dollars), punitive damages, attorneys' fees and pre- and post-judgment interest.

b. *The Check-off Complaints*

The check-off complaint is a form to be completed by each worker-plaintiff. As the name suggests, the worker-plaintiff is required to check off appropriate boxes in the check-off complaint, thus supplying more specific information about the individual worker's claims. The check-off complaints contain information about the sites at which each worker-plaintiff worked, the dates on which the worker-plaintiff worked at those

[6] The Master Complaint also contains claims for loss of consortium and wrongful death.

sites, the worker-plaintiff's employer, the injuries the worker-plaintiff claims to have suffered and the date when those injuries first manifested themselves. Many of the filed check-off complaints are incomplete, and in many instances the worker-plaintiffs indicate they will supply additional information at a later date.

c. *Causation and Injuries*

The gist of the causation allegations is that the worker-plaintiff became ill as a result of exposure to toxins and other contaminants. According to the Master Complaint:

> Plaintiff breathed in, ingested, came into contact with and/or absorbed said toxins, contaminants and other harmful airborne products during the entire time he/she performed clean-up, construction, demolition, excavation, and/or repair operations and worked at the aforementioned "locations," this sustaining injury during the entire period of his/her employment activities at said locations.[7]
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> * * *
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> In consequence of the afore-described exposures to toxins, contaminants, and harmful products, and/or their harmful airborne products at the certain premises and buildings, or a portion thereof, located in lower Manhattan at the "locations," the Plaintiff sustained physical and other injuries.[8]

The same theme is carried forward in the check-off complaints which allege:

> 31. The Injured Plaintiff was exposed to and breathed noxious fumes on all dates, at the site(s) indicated above, unless otherwise specified.
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> 32. The Injured Plaintiff was exposed to and inhaled or ingested toxic substances and particulates on all dates at the site(s) indicated above, unless otherwise specified.

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[7] Master Complaint, ¶107, DB000060.
[8] *Id.*, ¶112, DB000061.

> 33. The Injured Plaintiff was exposed to and absorbed or touched toxic or caustic substances on all dates at the site(s) indicated above, unless otherwise specified.[9]

Worker-plaintiffs may select from a large array of injuries when completing the check-off complaints. The alleged injuries run the gamut from sinusitis and insomnia to various cancers and death.

C. The Insurance Policies

1. C&I Policies

Deutsche Bank was an additional insured under five primary policies and five excess policies issued by C&I to PAL.[10] These policies cover both the Liberty Street and Albany Street sites, but are limited to claims by persons alleging they were injured as a result of PAL's ongoing operations.

a. C&I Primary Policies

(1.) The 2000 – 2001 and 2001 – 2002 Primary Policies

The first C&I policy, effective December 13, 2000 through December 13, 2001,[11] and the second,[12] effective the following year, are in all material respects nearly identically worded. Both policies provide

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[9] Check-off complaint, ¶¶31-33, DB024454. The example in the text is taken from the 21 MC 102 docket. The amended short form check-off complaint in the 21 MC 104 docket is less detailed, but still contains allegations the alleged injuries were caused by exposure to toxins. (*E.g.* DB017727).

[10] Stipulation, ¶5, D.I. 96.

[11] Policy AAI 778-2347; C&I 02001619.

[12] Policy AAI 778-2347; C&I 02001582.

coverage for "Bodily Injury" which is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."[13] There is no doubt that the clean-up workers' complaints allege a "bodily injury" as defined in these and the later C&I policies.

Both of the early C&I policies impose a duty to defend claims for bodily injury which arguably come within the policy's coverage:

> We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.[14]

Unlike the remaining C&I primary policies and all of the Royal and Landmark policies, the first two C&I policies are eroding policies—they contain endorsements which provide that defense costs are applied against the policy limits.[15] Payment of defense costs, therefore, reduces the amount available to pay the clean-up workers' claims.

(2.) The 2002 – 2003, 2003 – 2004 and 2004 – 2005 Primary Policies

For the most part, the wording of the material provisions in the above policies[16] is similar, and sometimes identical, to the wording in the corresponding provisions of the earlier C&I policies. Like the earlier C&I

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[13] C&I 02001633.
[14] C&I 02001622.
[15] 2000-2001 policy, endorsement AA2 (C&I 02001648-49); 2001-2002 policy, endorsement AA (C&I 02001610-11).
[16] PRO 7788251 (C&I 02001150) (2002-2003); PROP 7788251 (C&I 02000341) (2003-2004); PROP 1370767 (C&I 02000246) (2004-2005).

policies, they provide coverage for bodily injury, which is defined as "bodily injury, sickness or disease sustained by a person, including mental anguish or death resulting from any of these at any time."[17] The duty to defend clause in these policies is similar to that found in the earlier C&I policies:

> We will have the right and duty to defend the insured against any suit seeking those damages. However, we will have no duty to defend the insured against any suit seeking damages for bodily injury or property damage to which this insurance does not apply. We may at our discretion investigate any occurrence and settle any claim or suit that may result.[18]

The later C&I policies contain some notable changes, however, from the first two. For one, defense costs do not reduce policy limits and, therefore, these later policies are not eroding policies. Another, is a change in the language of the "other insurance" clause. That change and its significance are discussed later in this opinion.[19]

b. *C&I Excess Policies*

The C&I excess policies are nearly identical to one another, the only material difference being the amount of coverage provided. The first three policies[20] have limits of 8 million dollars per occurrence and in the aggregate. The last two excess policies[21] have limits of 9 million dollars, which corresponds to a reduction in primary coverage from two million to

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17 C&I 02000864.
18 *E.g.* C&I 02000843.
19 See text accompanying note 105, *et seq.*
20 Dec. 13, 2000 – Dec. 13, 2001 (C&I 02000000); Dec. 13, 2001 – Dec. 13, 2002 (C&I 02001943); Dec. 13, 2002 – Dec. 13, 2003 (C&I 02000722).
21 Dec. 13, 2003 – Dec. 13, 2004 (C&I 02000580); Dec. 13, 2004 – Dec. 13, 2005 (C&I 02001781).

one million dollars. In each case, the C&I primary policy for the corresponding year is identified as the "underlying insurance."

The C&I excess policies extend coverage to any entity which qualifies as an insured under the underlying insurance, meaning that if Deutsche Bank is an insured under the primary policies, it is also an insured under the excess policies. The excess policies also provide that C&I has a right and duty to defend if no underlying insurance provides a defense to bodily injury claims. The policies provide that if defense costs are within the limits of the underlying policy, those costs are within the limits of the excess policy. As a result, the first two excess policies are eroding policies and the last three are not.

2. Royal Policies

Royal issued two one-year primary policies and two excess policies, which correspond to the primary policies. The first of these pairs incepted January 1, 2002 and the second January 1, 2003. Notably, they are limited to injuries allegedly incurred at the Liberty Street site—no coverage was provided for the Albany Street site. The coverage provided by these policies was not limited to claims by workers alleging they were injured by PAL's ongoing operations.

a. Royal's Primary Policies

(1.) *The 2002 Primary Policy*

The first Royal primary policy, for which Deutsche Bank paid a premium of 500,000 dollars, incepted January 1, 2002 and expired

January 1, 2003.[22] The named insured on this policy is Taunus Corporation, but Plaintiffs and Royal have stipulated that the actual insured is DBTCA, which was the owner of the property. This policy insures only the building at the Liberty Street site; no coverage is provided for the building at the Albany Street site. Its limits are 2 million dollars per occurrence and 2 million dollars in the aggregate.

The policy provides coverage for, among other things, claims for bodily injury. It obligates Royal to defend claims seeking damages for bodily injury:

> We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' . . . to which this insurance does not apply.[23]

Unlike the early C&I policies, the costs of defense under the Royal policies are outside the policy limits, meaning they will not reduce the policy limits.

(2.) *The 2003 Primary Policy*

Royal renewed its 2002 policy for the following year.[24] Most of the terms of the 2003 policy are identical to the 2002 policy, except that the occurrence limit was reduced from 2 million dollars to 1 million dollars.[25] As does the 2002 policy, this policy provides coverage only for the Liberty

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22 Policy KHA100578, DB009518.
23 DB009523.
24 Policy K2HA101104; Royal 02069.
25 Royal 02070.

Street site. The duty-to-defend language is identical to that in the 2002 policy, and the defense costs are outside the policy limits.

b. *Royal's Excess Policies*

(1.) *The 2002 Excess Policy*

Royal issued an excess policy to Taunus Corporation with per occurrence and aggregate limits of 2 million dollars.[26] As in the case of the Royal primary policies, Plaintiffs and Royal have stipulated that DBTCA, the owner of the Liberty Street site, is the insured. This excess policy lists as the underlying insurance Royal's 2002 primary policy.

The policy follows form, meaning that it is "subject to the same terms, conditions, agreements, exclusions and definitions as the 'underlying insurance.' "[27] This alone creates a duty to defend because the underlying policy obligated Royal to defend. Deutsche Bank correctly points out that the excess policy also reiterates that duty, stating:

> We will have a duty to defend such claims or suits [for bodily injury] when the applicable limits of the underlying Insurance [the Royal 2002 primary policy] has been exhausted by payments of judgments, settlements and any cost or expenses subject to such limit.[28]

As with the primary policy the costs of defense are outside the policy limits.

(2.) *The 2003 Excess Policy*

The Royal excess policy for 2003 is in all material respects identical to the 2002 excess policy, except that the underlying insurance

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[26] Policy KHA017049; DB009561.
[27] DB009571.
[28] DB009570.

is Royal's 2003 primary policy.[29] Its limits are 2 million dollars per occurrence and in the aggregate. This excess policy also follows form.

3. Landmark Policies

a. *Landmark's Primary Policies*

Landmark issued two primary and two corresponding excess policies to DBTCA. Coverage spanned the years 2004 and 2005. Initially, coverage was limited to the Liberty Street site, but a later endorsement extended coverage to the Albany Street site. Both the 2005 primary and excess policies were cancelled effective August 15, 2005.[30]

(1.) *2004 Primary Policy*

The first Landmark primary policy incepted December 1, 2003 and provided coverage through January 1, 2005.[31] Like the Royal policies, the Landmark policies named Taunus Corporation as the insured. Plaintiffs and Landmark have stipulated, however, that DBTCA is the named insured. At its inception this policy provided coverage only for the Liberty Street site, but effective October 20, 2004 the policy was amended to provide coverage for the Albany Street site.[32]

The 2004 Landmark primary policy provided, among other things, bodily injury coverage, with limits of 1 million dollars per occurrence and 2 million dollars aggregate. The definition of "bodily injury" and the duty-

[29] Policy K2HA019896; DB009621.

[30] This cancellation is explained by Deutsche Bank's sale of the Liberty Street site in 2004 and the sale of the Albany Street site on August 5, 2005. See text accompanying note 51-55.

[31] Policy LHA102044; Landmark 01941.

[32] Endorsement 13, Landmark 01986; Endorsement 16, Landmark 01989.

to-defend clause are identical to that found in the Royal primary policies.[33]

(2.) *2005 Primary Policy*

Landmark renewed its 2004 policy for 2005. The certificate of renewal[34] contains no changes material to the issues presented in this case. This policy was cancelled effective August 15, 2005, and Landmark refunded a portion of the premium to Deutsche Bank.[35]

b. *Landmark's Excess Policies*

(1.) *2004 Excess Policy*

Landmark issued an excess policy to Taunus Corporation[36] which provided limits of 1 million dollars per occurrence and 2 million dollars in the aggregate. The underlying policy is Landmark's 2004 primary policy, and this excess policy follows the form of that primary policy.[37] As with the Royal excess policies, the Landmark excess policy contains an express duty to defend.[38]

(2.) *2005 Excess Policy*

There is no material difference between the 2004 Landmark excess policy and the 2005 excess policy, except that the policy limits were increased to 10 million dollars, both per occurrence and aggregate. Like

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33 Landmark 01948.
34 Policy HA102044; Landmark 01993.
35 Cancellation Endorsement; Landmark 2005.
36 Again, Plaintiffs and Landmark agree that the named insured under this excess policy and the 2005 excess policy is DBTCA.
37 Landmark 02025.
38 *Id.*

the underlying Landmark primary policy, this policy was cancelled effective August 15, 2005.

III. ANALYSIS

C&I disputes that it has a duty to defend because its policies do not cover the clean-up workers' claims. In contrast, Royal and Landmark acknowledge that—subject to the limitation that the Albany Street site was not insured by Landmark until October 20, 2004—some, if not most, of the claims come within the scope of their policies. Their primary bone of contention centers on the pecking order of the policies. Before resolving that question, it is necessary, of course, to first determine whether C&I has a duty to defend.

A. Choice of Law

Not surprisingly, the court has previously ruled that the substantive issues are governed by New York law. The clean-up giving rise to the workers' injuries took place in New York, the underlying lawsuits are pending in New York, at least two of the C&I primary policies specifically provide they are governed by New York law, and all of the Royal and Landmark policies are site specific to locations in New

York. This choice of law does not govern certain procedural matters discussed later which are governed by Delaware law.

B. Deutsche Bank is Insured Under the C&I Policies

C&I asserts that it is not obligated to provide a defense to any of the clean-up worker suits because Deutsche Bank was not an additional insured under its policies. Alternatively, C&I contends that if Deutsche Bank qualifies as an additional insured, C&I is still not obligated to provide coverage for some, if not most, of the claims because Deutsche Bank failed to provide timely notice of the claims to it.

1. Deutsche Bank is an Additional Insured Under Policies Issued to PAL

C&I's argument that Deutsche Bank is not an additional insured is barred by a stipulation between the parties. The argument also fails on its merits.

a. *C&I's Argument is Barred by its Stipulation*

C&I's contention that Deutsche Bank is not an additional insured must be rejected because it contradicts a stipulation[39] entered into by all of the parties prior to briefing. The pertinent portion of that stipulation provides that the parties agreed to the following:

> The C&I primary policies identified below **contain an endorsement that provides that Deutsche Bank is an additional insured** under those policies subject to the terms of the endorsement:

[39] Stipulation of Facts; D.I. 96.

> - Policy number AAI 778-2347, policy period December 13, 2000 to December 13, 2001
> - Policy number AAI 778-2347, policy period December 13, 2001 to December 13, 2002
> - Policy number PRO 7788251, policy period December 13, 2002 to December 13, 2003
> - Policy number PROP 7788251, policy period December 13, 2003 to December 13, 2004
> - Policy number PROP 1370767, policy period December 13, 2004 to December 13, 2005
>
> The parties reserve their rights to argue that Deutsche Bank is an additional insured on any other C&I policies at issue in this litigation.[40]

C&I contends that this stipulation somehow does not bar it from arguing that Deutsche Bank is not an additional insured. The contention fails because it contradicts the plain meaning of the stipulation.

The provisions of the stipulation could not be more clear—the parties agreed that the C&I policies "contain an endorsement that provides that Deutsche Bank is an additional insured." This language alone puts an end to the issue. There is yet more language in the stipulation which forecloses C&I's argument. In the last sentence of the stipulation the parties reserved the right to litigate whether Deutsche Bank is an additional insured "on any other C&I policies." The fact that the parties reserved the right to litigate whether Deutsche Bank is an additional insured on "other C&I policies" necessarily suggests that C&I waived the right to litigate whether Deutsche Bank is an additional insured under the policies listed in the stipulation.[41]

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[40] *Id.* at ¶4 (emphasis added).

[41] Because the language of the stipulation is unambiguous, it is inappropriate to resort to rules of construction in order to apply that language to the case at bar.

Having concluded that C&I stipulated that Deutsche Bank is an additional insured, it is necessary to consider the effect that stipulation has on the issue at hand. It is now settled law in Delaware[42] that stipulations are binding on the parties and are conclusive as to the subject matters of the stipulation. In *Merritt v. United Parcel Service*,[43] a workers' compensation case, the employer wrote to the Industrial Accident Board that the employee-claimant was entitled to "ongoing" temporary partial disability. Nonetheless, at the behest of the employer, the Board held that the worker's temporary partial disability benefits would be terminated after six weeks. The Delaware Supreme Court held this was error because it contradicted the employer's admission which was binding upon it:

> We conclude that UPS's admission was the equivalent of a judicial admission and should therefore have been given conclusive effect. Voluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.*, statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court) are termed "judicial admissions." Here, UPS voluntarily and expressly conceded in its Letter to the Board that Merritt's partial disability was "on-going." UPS's counsel reiterated that admission at the Board hearing, and asked the Board to "enter an order consistent with [the] [L]etter." In these circumstances, UPS's admission, made during the

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Nonetheless, the court notes in passing that C&I's contention would render the language in the stipulation that the policies "contain an endorsement that provides that Deutsche Bank is an additional insured" a virtual nullity. It is a familiar rubric of contract interpretation that a "court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole." *Council of Dorset Condominium Apartments v. Gordon*, 801 A.2d 1, 5 (Del. 2002).

[42] Although the substantive issues here are governed by the law of New York, the procedural issues (including the preclusive effect of a stipulation) are governed by Delaware law.

[43] 956 A.2d 1196 (2008).

> administrative proceedings before the Board, merits the same treatment as a judicial admission.[44]

The *Merritt* court recognized that tribunals have the discretion, in appropriate circumstances, to relieve a party from the burden of an admission or stipulation. Here, C&I has relied exclusively on its contorted reading of its stipulation in order to avoid the consequences thereof. At no time, however, has it suggested that the stipulation was the product of fraud or offered some other compelling reason which might persuade this court to exercise its discretion in favor of vacating the stipulation. Accordingly, the court concludes that C&I is bound by the stipulation which conclusively establishes that Deutsche Bank is an additional insured.

b. *Deutsche Bank is an Additional Insured Under the Terms of the C&I policy*

The court is aware of the significant possibility that one or more of the parties will seek appellate review in this matter. Therefore, notwithstanding its finding that the stipulation conclusively establishes that Deutsche Bank is an additional insured under the policy, the court will briefly examine the merits of C&I's argument in order to provide the Delaware Supreme Court with an adequate record for review if it should find that the stipulation does not preclude C&I's substantive argument.

Any determination whether a party is an insured under a policy must begin, of course, with the language of the policy itself.[45] Although

[44] *Id.* at 1201 (footnote omitted).

the language of the C&I primary policies[46] varies, there is a common thread in each—facility owners are additional insureds when PAL was required "by written contract" to obtain insurance coverage for the facility owner for injuries arising from PAL's operations:

- The pertinent language in the first two policies is identical. Each contains an endorsement[47] entitled "Additional Insured -- Owners, Lessees or Contractors Form B." The endorsement provides:

  > WHO IS INSURED (Section II)[48] is amended to include as an insured the person or organization shown in the schedule, but only to liability arising out of your [PAL's] ongoing operations for that insured.

  The schedule appearing on the endorsement lists "Facility Owners, . . . *as required by written contract.*"[49]

- An endorsement in the 2002-2003 policy provides in pertinent part:

  > It is hereby agreed that Section II of the policy, WHO IS AN INSURED is amended to include as an insured the person or organization shown in the schedule above as respects Insuring Agreements A, B and C, but only with respect to liability arising out of your ongoing operations performed by you or on your behalf for that insured. Coverage is not

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45 *Consolidated Edison Co. of New York v. Allstate Ins. Co.,* 774 N.E.2d 687, 693 (N.Y. 2002) ("In determining a dispute over insurance coverage, we first look to the language of the policy.")

46 The court need only determine whether Deutsche Bank is insured by the primary policies because the C&I umbrella policies provide that the "word 'insured' means any person or organization qualifying as such in underlying insurance." *E.g.* C&I 02000001.

47 The endorsement for the 2000-2001 policy is found at C&I 02001646. The same endorsement is included in the policy for 2001-2002. C&I 02001608.

48 Section II of these policies is labeled "WHO IS INSURED".

49 C&I 02001646; 02001608 (emphasis added).

> afforded for the additional insured's own liability, which arises solely out of its acts or omissions.[50]

The schedule lists as an additional insured any person "*As required by written contract.*"[51]

- The endorsements for the 2004 and 2005 policy years provide coverage for "clients whom *you have agreed, by written contract*, to include as additional insureds, but only for liability arising out of your work . . . ."[52]

The court is, therefore, required by the C&I policies to determine (1) whether Deutsche Bank (in this case DBTCA) was the owner of the Liberty Street and Albany Street sites and, if so, (2) whether PAL was required "by written contract" to obtain insurance coverage for the owner of these facilities.

(1.) *DBTCA is the Owner of the Pertinent Sites*

The evidence that DBTCA was the owner of both facilities is overwhelming. Deutsche Bank submitted the affidavit[53] of John Scordo, Esquire, a member of the bars of New York and New Jersey, who is member of the law firm Day Pitney, LLP which advises Deutsche Bank on certain matters. Attached to Mr. Scordo's affidavit are four deeds and a certificate of the New York Banking Department which demonstrate that DBTCA was, at all pertinent times, the owner of the Liberty Street and Albany Street sites. Those documents show that:

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50 C&I 02001199 (Dec. 13, 2002-Dec. 13, 2003).
51 *Id.* (emphasis added).
52 DB010037 (2003-2004); C&I 02000262 (2004-2005) (emphasis added).
53 D.I. 150.

- On June 14, 1990 Bankers Trust purchased the Albany Street site.
- On January 24, 1996 Bankers Trust purchased the Liberty Street site.
- On March 14, 2002 Bankers Trust changed its name to Deutsche Bank Trust Company Americas (DBTCA).
- On August 31, 2004 DBTCA sold the Liberty Street site.
- On August 5, 2005 DBTCA sold the Albany Street site.

C&I argues that seventy work orders list a Deutsche Bank entity other than DBTCA as the "owner." This contention is of dubious legal significance because the "additional insured" under the Insurance Rider in the PAL contract included all the entities affiliated with Deutsche Bank including the other entity listed as "owner" on those handfuls of work orders. But, even assuming that there is some significance as to whether DBTCA or some other Deutsche Bank entity was the owner of these sites, the evidence proffered by C&I falls far short of showing a *genuine* dispute of fact.[54]

It is settled law that the "party opposing the motion for summary judgment has the duty to come forward with admissible evidence

[54] The court notes that C&I made its argument based on the work orders before Deutsche Bank introduced the deeds into the record. C&I can hardly claim it is surprised by the deeds, which are matters of public record and could have been, indeed *should* have been, reviewed by C&I before advancing what amounts to a frivolous argument.

showing the existence of a genuine issue of fact."[55] This court will not consider inadmissible evidence when resolving a motion for summary judgment.[56] The party relying upon the evidence bears the burden of showing it is admissible.[57]

C&I has failed to show that the evidence upon which it relies—the 70 change orders—is admissible for purposes of showing ownership of the Liberty Street site. It goes without saying that a fact witness may offer testimony only about facts within the witness' personal knowledge.[58] This concept is carried through to summary judgment procedures. The rules of this court require that "[s]upporting and opposing affidavits shall be made on personal knowledge."[59] It is, therefore, incumbent upon C&I to point to record evidence that would enable the Court to find that the authors of the change orders had personal knowledge of the ownership of the Liberty Street site. Not surprisingly, C&I has not done so. Accordingly, the Court has disregarded the change orders and finds there is no genuine dispute that DBTCA is the owner of the Liberty Street site.

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55 *Humm v. Aetna Cas. and Sur. Co.*, 656 A.2d 712, 717 (Del. 1995); *Hills Stores Co. v. Bozic*, 769 A.2d 88, 102 (Del. Ch. 2000) ("The non-moving party must submit admissible evidence sufficient to generate a factual issue for trial or suffer an adverse judgment."); *see Anderson v. Liberty Lobby*, 477 U.S. 242, 248-9 (1986) ("If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.").

56 *In re Asbestos Litigation*, 2007 WL 1651968, *22, Slights, J. (Del. Super. Jun. 25, 2007).

57 *Hills Stores Co.*, 769 A.2d at 102.

58 D.R.E. 602.

59 Del. Super. Ct. Civ. R. 56(e); 11 J. Moore, *Moore's Federal Practice*, §56 11(7)(b) ("Summary judgment, like judgment as a matter of law, should be granted unless the evidence opposing summary judgment is 'substantiated.' A 'scintilla' of evidence supporting nonmovant is not sufficient to defeat summary judgment.").

Even if the Court were to consider the change orders, it would find there is no *genuine* dispute over the ownership of the Liberty Street site. In summary judgment proceedings the "mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury reasonably could find for the [non-moving party]."[60] As previously noted, Deutsche Bank has copies of recorded documents showing that DBTCA was the record owner of the properties during the pertinent time frame. The Court finds that under these circumstances no reasonable trier of fact could find, on the basis of the change orders, that some entity other than DBTCA was the owner. The court concludes, therefore, that for purposes of summary judgment the record conclusively demonstrates that DBTCA was the owner of the buildings.

(2.) *PAL was Required by Written Contract to Obtain Insurance Coverage*

The second determination the court must make is whether PAL was required by written contract to provide insurance to Deutsche Bank. Tishman, on behalf of Deutsche Bank, entered into two agreements with PAL: one for the Liberty Street site and the other for the Albany Street site. In both of those agreements PAL obligated itself to purchase insurance to protect Deutsche Bank. Paragraph 8 of both contracts required PAL to obtain, among other coverage, Comprehensive General Liability coverage:

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[60] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

> Unless otherwise provided for by the attached insurance Rider, prior to commencement of any work under this contract, and until completion and final acceptance of the Work, the Contractor and each and every subcontractor shall, at its own expense, maintain the following insurance on its own behalf and for the protection of the Owner, Construction Manager and all other indemnitees named in this Contract: (a.) Comprehensive Liability.
>
> * * *
>
> **All of the above coverages shall comply with the specific requirements contained in the Insurance Rider hereby attached and made a part of this contract.**[61]

The Insurance Rider, in turn, required that "Deutsche Bank AG New York" and its "parent companies, corporations and/or partnerships and their owned, controlled, affiliated associated and subsidiary companies, corporations and/or partnerships" be additional insureds on the policy. As a matter of law, therefore, the contract obligated PAL to obtain insurance with Deutsche Bank as an additional insured.

C&I devotes scant attention to the language of the PAL agreement in its briefs. Rather, it argues that Deutsche Bank is not an additional insured because it did not contract directly with PAL. Notably, C&I fails to point to any language in its policy requiring that the "written contract" be with an additional insured. At most the language of the C&I policy requires that there be *a* written contract requiring PAL to obtain coverage.[62] According to New York law, all which is needed under the plain language of these policies is "that some contract exist obligating

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[61] DB011689 (Albany Street site contract); DB011712 (Liberty Street site contract) (emphasis added).

[62] Accordingly, it is unnecessary for the court to decide if Tishman or Deutsche Bank is a party to the contract with PAL.

[PAL] to procure coverage for an additional insured, without requiring that the additional insured itself be a party to that agreement."[63] C&I does not point to a single word in any of its policies requiring that the additional insured be a party to the contract giving rise to PAL's obligation to obtain coverage.

Rather than grounding its argument on the language of its policies, C&I merely refers in passing to the New York Court of Appeals decision *BP Air Conditioning Corp. v. One Beacon Ins. Group*[64] for the proposition that a "party seeking additional insured status must demonstrate the written underlying trade contract between the parties requiring the Named Insured to name the other party as an additional insured."[65] But, *BP Air* provides no help to C&I. First, BP Air's status as an additional insured was never questioned, and, therefore, the New York Court of Appeals did not even examine the issue. Second, unlike the C&I policies, the language in the *BP Air* policy expressly required a contract directly between the named insured and the additional insured.[66]

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63 *Brooklyn Hosp. Ctr. v. One Beacon Ins.*, 799 N.Y.S.2d 158, *4 (N.Y. Sup. Ct. 2004).
64 871 N.E.2d 1128 (N.Y. 2007).
65 D.I. 131 at 15.
66 *BP Air*, 871 N.E.2d at 1130 (stating that the endorsement at issue provided in pertinent part that "Who is An Insured" "is amended to include as an insured any person or organization for whom you are performing operations *when you and such person or organization have agreed in writing in a contract or agreement* that such person be added as an additional insured . . . .") (emphasis added).

2. With the Exception of a Handful of Cases, Deutsche Bank Provided Timely Notice of Claims and Did Not Forfeit Coverage

C&I contends that Deutsche Bank failed to provide it with timely notice of many, if not all, of the clean-up workers' claims. According to C&I, Deutsche Bank has forfeited any coverage for those claims which it would otherwise be entitled because of the purported late notice. C&I touted that "[m]any of the tendered WTC lawsuits should be barred from coverage . . . based upon [Deutsche Bank's] failure to provide timely notice of those actions."[67] During briefing and oral argument, the scope of this argument has been drastically narrowed, and now only a handful of the underlying claims are at issue.

New York law requires an insured, as a condition precedent to coverage, to provide notice in a reasonable period of time to its insurer of any claim against the insured:

> Generally, the requirement that an insured provide notice of any occurrence to the insurance company within a reasonable time is considered a condition precedent to the insurer's obligation to defend or indemnify the insured.[68]

The C&I policies likewise require notice of an occurrence or loss within a reasonable amount of time. There is no bright line delineating what constitutes a reasonable amount of time. Rather, the determination of what is a reasonable period of time turns on the circumstances of the

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[67] D.I. 111 at 31.

[68] *CCR Realty of Dutchess, Inc. v. New York Central Mutual Fire Insurance Co.*, 766 N.Y.S.2d 856 (N.Y. App. Div. 2003).

case.[69] The court finds here that, given the large influx of claims, notice within 60 days shall be deemed sufficient.[70]

The narrow scope of C&I's late-reporting defense is attributable to Deutsche Bank's organized efforts to provide notice to its insurers of clean-up worker suits filed against it. After the first claims trickled in, Deutsche Bank set up a systematic and efficient method for notifying insurers and others of those claims. Deutsche Bank first learned of a claim in October, 2004, and by the end of 2005 less than ten cases had been filed against it. Notwithstanding the small number of claims then pending, Deutsche Bank apparently anticipated the onslaught to follow. In early 2006 it created the Notice Project, the members of which constructed a routinized method for notifying insurers and others of new claims. The Notice Project proved highly successful. C&I now concedes that all but a handful of the underlying claims were reported to it in a timely fashion.

It does not necessarily follow that Deutsche Bank has forfeited coverage for the few late-reported claims. The corollary to the rule that the insured must promptly report a claim is that the insurer must

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[69] *See Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 121 (2d Cir. 1984) (applying New York law); *Nails 21st Century Corp. v. Colonial Co-op Ins. Co.*, 803 N.Y.S.2d 626, 627 (App. Div. 2005) ("Whether an insured has given timely notice of an occurrence depends on the particular facts and circumstances.").

[70] The claims here are different from those which might require faster notice to the insurer. For example, if a claim involves an automobile accident the insurer would need more prompt notice so as to be able to perform a forensic examination of the accident scene before time and nature make such an examination impossible. In contrast, a clean-up worker's exposure to toxins could occur years before the disease manifests itself making in unfeasible to conduct a forensic examination of the exposure site.

disclaim coverage "as soon as reasonably possible."[71] To be effective any disclaimer must inform the insured "with a high degree of specificity of the ground or grounds on which the disclaimer is predicated."[72] The disclaimer, therefore, must mention in some specific fashion that it is based, at least in part, on the insured's failure to provide timely notice.[73] Again, given the large influx of claims, the court finds that under the circumstances of this case 60 days is a reasonable time for C&I to deny coverage.

The record is generally devoid of evidence that C&I declined coverage on the basis of untimely notice. To be sure, there are isolated instances in which C&I issued such denials. For the most part, however, C&I relies upon two of its affirmative defenses in the instant matter as supplying the requisite denial of coverage. In its affirmative defenses C&I alleged:

> AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
>
> The claims against C&I may be barred in whole or in part by the terms, conditions, exclusions, limitations and provisions of the C&I policies.
>
> AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
>
> The claims against C&I may be barred in whole or in part by any failure to provide C&I with timely and proper notice of an occurrence, claim or suit. [74]

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71 New York Insurance Law §3420(d)(2).

72 *Estee Lauder, Inc. v. One Beacon Ins. Group, LLC*, 873 N.Y.S.2d 592, 594-5 (N.Y. Sup. 2009).

73 *Olin Corp. v. Ins. Co. of North America*, 2006 WL 509779, *2 (S.D.N.Y. Mar. 2, 2006) ("It is a well settled principle of New York law that once an insurer specifies the particular grounds upon which it disclaims coverage, the insurer waives its right to subsequently disclaim based on other unspecified grounds.").

74 C&I Answer.

This boilerplate does not provide the insured with specific reasons why the coverage is being denied; so, Deutsche Bank is left to guess which of the claims it submitted were deemed untimely by C&I. Indeed, C&I's argument would also require this court accept that C&I has some preternatural ability to determine which of Deutsche Bank's future claim submissions would be untimely. Denials of coverage are not like socks—one size does not fit all. Rather, they must be tailored to the specific claim for which coverage is being denied and must state the specific reasons for the denial of coverage of that particular claim. This is not to say that a generalized denial of coverage is not appropriate in certain cases. But, in this case, where only a few of the claim submissions were untimely, a generalized denial applying to all submissions does not suffice. The court, therefore, finds that this affirmative defense does not constitute an adequate denial of coverage.[75]

C. Who Covers What?

1. Which Clean-up Workers' Claims Fall Within Which Insurer's Coverage

From an analytical point of view it makes sense to separately consider three classes of worker-plaintiffs: (1) those who worked exclusively for PAL (the "PAL employees"); (2) those who worked for PAL

[75] In instances, the ostensible denial of coverage contained in the affirmative defense is untimely.

and another contractor at a Deutsche Bank site (the "hybrid employees");[76] and (3) those who worked at a Deutsche Bank site but never worked for PAL (the "non-PAL employees"). The court concludes that the claims of the PAL employees and the hybrid employees come within the C&I coverage and that the claims of all three classes of employees (provided they worked at a covered site) come within the Royal/Landmark coverage.

a. *The PAL Employees*

C&I concedes (subject to its argument that it does not provide coverage here) that the claims of the PAL employees come within its coverage. Royal and Landmark, likewise, do not dispute that the claims of the PAL employees come within its coverage, provided the PAL employee worked at a covered site. Both sides rely upon their other insurance clauses to reduce or eliminate their duty to defend the PAL employees' claims.[77]

b. *The Hybrid Employees*

C&I's policies provide coverage only for injuries "arising out of [PAL's] ongoing operations." C&I argues that the hybrid employees' complaints do not sufficiently allege that the worker-plaintiff was injured as a result of PAL's ongoing operations and, therefore, those claims do not come within its coverage.

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[76] Hector Betancourt is an example of a hybrid employee. He alleges that he worked for PAL and ETS Contracting during the period September 17, 2001 through April 21, 2003 at the Liberty Street site. DB09041, 09044.

[77] The other insurance clauses are discussed in the text accompanying note 86, *et seq.*

The familiar "four corners" rule is the basis in New York for determining whether an insurer has a duty to defend a particular claim. Under this rule "[a]n insurer must defend whenever the four corners of a complaint suggest—or the insurer has actual knowledge of facts establishing—a reasonable possibility of coverage."[78] It is well settled in New York, as elsewhere, that the duty to defend is exceedingly broad:

> [T]he duty to defend is broader than the duty to indemnify . . . . In other words, as the rule has developed, an insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage. [79]

The question becomes whether the hybrid employees' complaints suggest a reasonable possibility that injuries arise out of PAL's ongoing operations. The phrase "arising out of" has been broadly construed by the New York courts in insurance coverage cases. It is "ordinarily understood to mean originating from, incident to, or having connection with" the subject to which it refers.[80] In the underlying cases the workers allege that they were injured by exposure to toxins.[81] The court has no difficulty in finding that the hybrid employees' complaints sufficiently allege that their injuries arose out of PAL's ongoing operations; in each instance they allege that they were exposed to toxins while working for PAL. The Master Complaint contains allegations that

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[78] *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993).
[79] *Fitzpatrick v. American Honda Motor Co., Inc.*, 575 N.E.2d 90, 92 (N.Y. 1991).
[80] *Landpen Co., L.P. v. Maryland Cas. Co.*, 2005 WL 356809, *6 (S.D.N.Y. Feb. 15, 2005).
[81] See text accompanying note 7 for a brief reference to the causation allegations in the underlying complaints.

this exposure was caused by the negligence of "defendant's . . . contractors." There are allegations such as contractors (which would, of course, include PAL) failed to properly test equipment, failed to properly instruct and monitor the workers, and failed to monitor air quality. It is difficult to envision a more straightforward application of the phrase "arising out of" than this one. While it is true that the hybrid employees' complaints may be construed to also allege that they were injured as a result of other entities' operations, the court cannot rule out the possibility at this stage that the hybrid employees' claims arose from PAL's operations. It finds, therefore, that the hybrid employees' complaints allege a nexus between PAL's operations and their injuries sufficient to implicate C&I's coverage.

The possibility that the hybrid employees' complaints may also assert claims against entities who are strangers to the instant case does not relieve C&I of its duty to defend. It is a maxim of New York law, as elsewhere, that "[i]f any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action."[82] Given that the hybrid employees' complaints allege at least some claims that require C&I to defend, C&I is obligated to defend the entire action on behalf of Deutsche Bank. "The fact that one policy may

[82] *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 690 N.E. 2d 866, 869 (N.Y. 1997).

be primary insurance does not preclude a determination that another policy also provides primary coverage."[83]

c. *The Non-PAL Employees*

By this court's definition of the term "non-Pal employees," those workers never worked for PAL. Accordingly, their complaints cannot reasonably be read to allege that the worker was injured as a result of PAL's ongoing operations on behalf of Deutsche Bank. Therefore, the C&I policies do not provide coverage for these claims. There is no dispute that the Royal and Landmark policies provide coverage for these claims, provided that the site restrictions in the policies are satisfied.

2. The Other Insurance Clauses

Most, if not all, insurance contracts contain "other insurance" clauses which specify what is to occur when a claim is covered by two or more policies. When this happens, courts determine the insurers' obligations to the insured by applying a body of law developed to resolve so-called "other insurance" disputes.[84] On the surface the process of resolving other insurance disputes can be deceptively simple—compare the competing other insurance clauses and see who wins.[85] The New

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[83] *Briarwood Farm, Inc. v. Central Mut. Ins. Co.*, 866 N.Y.S. 847, 852 (N.Y. Supr. 2008).

[84] *Great Northern Ins. Co. v. Mount Vernon Fire Ins. Co.,* 708 N.E.2d 167, 169 (N.Y. 1999) ("When an insured has more than one potentially applicable policy for a claim, courts determine the insurers' obligations to the insured by applying a body of law developed to resolve 'other insurance' disputes").

[85] *Sport Rock International, Inc. v. American Casualty Co. of Reading, PA*, 878 N.Y.S. 2d 339, 344 (App. Div. 2009); *State Farm Fire and Casualty Co. v. LiMauro*, 482 N.E.2d 13, 17 (N.Y. 1985) (referring to "evaluating the effect between carriers of the language of their policies").

York courts have found, however, that in practice the determination can become quite complex:

> The anomaly involved in establishing a pecking order among multiple insurers covering the same risk arises from the fact that although the insurers contract not with each other but separately with one or more persons insured, each attempts by specific limitation upon the rights of its insured to distance itself further from the obligation to pay than have the others. The result has been characterized as "a court's nightmare * * * filled with circumlocution", compared sarcastically to the "struggles which often ensue when guests attempt to pick up the tab for their dinner companions", and produced, it has been said, judicial decisions that are "difficult to interpret and in some instances impossible to reconcile." It has also produced an expression of surprise that the courts, rather than the insurance industry's arbitration mechanism, are resorted to so frequently to adjudicate the issue, and we add our own wonderment that the problem has not long since been dealt with by legislation or Insurance Department regulation. [86]

Fortunately, the terms of the other insurance clauses at issue lend themselves to a comparatively straight-forward analysis.

The purpose of the other insurance clause is to limit the carrier's obligation when other insurance may cover the claim. Generally speaking, there are two types of other insurance clauses. The first, often referred to as an excess clause, attempts to limit the insurer's obligation by providing that the primary coverage it provides will be excess to other primary coverage. The second, often referred to as a pro rata clause, seeks to limit the insurer's obligation by providing it will share costs pro rata with other primary carriers. There is no dispute that the C&I and Royal/Landmark other insurance clauses are all excess clauses. The

[86] *LiMauro*, 482 N.E.2d at 16 (internal citations and footnote omitted).

issue, therefore, is which clause prevails over the other or whether the clauses offset one another.

Frequently, a comparison of other insurance clauses reveals that the clauses offset one another or, in the parlance of insurance coverage cases, cancel each other out. In other words, when the other insurance clause of policy A makes it excess to policy B, and when the other insurance clause of policy B makes it excess to policy A, the clauses cancel each other out. When this occurs, the courts of New York (as elsewhere) hold that carriers A and B must share in the cost of defense:

> In insurance contracts the term "other insurance" describes a situation where two or more insurance policies cover the same risk in the name of, or for the benefit of, the same person. When an insured has more than one potentially applicable policy for a claim, courts determine the insurers' obligations to the insured by applying a body of law developed to resolve "other insurance" disputes. Under New York law, if the Mount Vernon coverage is excess, and hence the two policies are excess to one another, the two "other insurance" clauses cancel each other out and the companies must apportion the costs of defending and indemnifying Selby on a pro rata basis. In contrast, if Mount Vernon's coverage is primary with respect to Great Northern's, then Mount Vernon must pay up to the limits of its policy before Great Northern's coverage becomes effective.[87]

The comparison of the other insurance clauses will begin with consideration of the other insurance clauses in the C&I policy. Two different other insurance clauses appear in the C&I policies. One appears in the policies issued by C&I to PAL for the policy periods beginning December 13, 2000[88] and December 13, 2001.[89] The court has

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87 *Great Northern Insurance Co.*, 708 N.E. 2d at 170.
88 C&I 02001632.
89 C&I 02001594.

arbitrarily labeled this clause "C&I Type A." The second appears in C&I primary policies issued December 13, 2002;[90] December 13, 2003[91] and December 13, 2004,[92] which the court has labeled "C&I Type B." The same other insurance clause appears in all the Royal and Landmark policies. The next step in the analysis, therefore, is to compare C&I Type A with the Royal other insurance clause, and then to compare C&I Type B to the other insurance clause contained in the Royal[93] and Landmark policies.

a. *January 1, 2002 – December 13, 2002 (C&I Type A v. Royal)*

The C&I Type A clause reads as follows:

> 4. Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> b. Excess Insurance
>
> This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

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90 C&I 02001183.
91 DB010041.
92 C&I 02000266.
93 The C&I Type B first found in the policy issued December 13, 2002 overlaps with the first Royal policy for 18 days—from December 13, 2002 until January 1, 2003.

> (2) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner; or
>
> (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).[94]

The language of this clause is straightforward. Part (a) of the clause provides that the C&I policy will serve as a primary coverage and will share with other primary coverage unless one of the three criteria set out in subpart b is satisfied, in which case the C&I policy will be excess to the other insurance. None of the three criteria is satisfied in this case: (1) the Royal policy is a CGL policy, not a fire, extended coverage, builder's risk or installation risk policy; (2) it does not provide fire insurance, and (3) the loss does not arrive out of the maintenance or use of automobiles, aircraft or watercraft. Nothing, therefore, in the first two C&I policies make the C&I coverage excess to Royal's.[95]

On the other hand, the language of Royal's other insurance clause, which is different from the C&I language, makes the Royal policy excess to the C&I policies. That clause (which first appears in an endorsement to the Royal 2002 policy) provides:

> 4. Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance

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[94] C&I 02001594.

[95] C&I argues that the other insurance clause in these two policies is "functionally identical" to the Royal counterpart. (D.I 186 at 32). It does not, however, point to the language in its policies which supports such an argument.

> This insurance is primary except when b, below applies. If this insurance is primary, our obligations are not affected unless any of the other Insurance is also primary. Then, we will share with all that other Insurance by the method described in c, below.
>
> b. Excess Insurance
>
> This insurance is excess over:
>
> (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
>
> (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
>
> (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
>
> (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I -- Coverage A -- Bodily Injury and Property Damage Liability.
>
> (2) **Any other primary Insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.**[96]

The emphasized language in this clause makes the Royal policy excess to "any other primary Insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." Manifestly, this language contemplates coverage such as provided by the

[96] DB 009537 (emphasis added).

C&I policies—Deutsche Bank was added as an additional insured for damages arising out of PAL's operations in those policies. The Royal policy, therefore, is excess to the C&I policies until December 13, 2002.[97]

Notwithstanding the language of the competing clauses, C&I argues that Royal should be required to share defense costs because it and Royal ostensibly insured different risks. It relies exclusively upon the Appellate Division's opinion in *Fieldston Property Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.*[98] In *Fieldston,* Hermitage Insurance issued a CGL policy to Fieldston which provided coverage for "bodily injury," "property damage" and "personal and advertising injury," while another carrier, Federal Insurance, issued a Directors and Officers policy to Fieldston which provided coverage to Fieldston, its officers and directors for "wrongful acts" as defined in that policy. The plaintiff in the underlying action, Chapel Farms Estate, Inc., filed a multiple count complaint against Fieldston in which only one of 18 counts arguably fell within the coverage provided by Hermitage. In the ensuing coverage litigation Federal argued that Hermitage had to provide a defense to Fieldston for all the counts under the in-for-one-in-for-all doctrine, and because of the wording of the other insurance clauses, Federal was

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[97] This does not mean, however, that the Royal policy never serves as a primary policy for Deutsche Bank. As discussed earlier, C&I has no obligation to defend claims brought by workers who were never employed by PAL. The Royal policy is primary for suits brought by those workers but only, of course, for those claiming to have worked at the Liberty Street site. Indeed, as discussed below, one of the C&I primary policies has been exhausted, and Royal serves as the lone primary carrier for claims arising under the exhausted policy.

[98] 873 N.Y.S.2d 607 (N.Y. App. Div. 2009).

excess to Hermitage and, therefore, was not obligated to provide a defense. The Appellate Division disagreed.

The focus of the *Fieldston* court's analysis was the language of Federal's other insurance clause. That clause made Federal's policy excess only when "any *Loss* arising from any claim made against the Insured(s) is insured under any other valid policy." The court reasoned that risks "that are covered by [Hermitage's] broad duty to defend are not thereby converted into risks that are covered by its policy."[99] Accordingly, even though Hermitage had a duty to provide a defense for the remainder of the claims, it had no duty to indemnify the insured for losses arising from those claims. For purposes of the Federal other insurance clause, those claims therefore did not become a "Loss . . . insured" by Hermitage and thus the Federal other insurance clause did not apply. Federal was therefore obligated to share in Fieldston's defense.

C&I reads *Fieldston* much too broadly.[100] That case does not, as C&I tacitly suggests, create a sweeping rule that when the competing policies provide different coverage, they must share in defense costs. Rather, as the *Fieldston* court took pains to explain, the result turned on the language of the competing other insurance clauses. It acknowledged that the "anomalies inherent in Federal's position might well be of no

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[99] *Id.* at 612, n.1.

[100] *Fieldston* was sharply criticized by another panel of the Appellate Division in *Sport Rock Intern., Inc. v. American Cas. Co. of Reading, PA. See* 878 N.Y.S.2d 339.

moment if they were compelled by the terms of the 'other insurance' clause."[101] The court concluded that "[a]s Hermitage correctly argues, *by its plain terms the 'other insurance' clause applied* only where a loss is insured under the D&O policy and another 'valid policy'."[102]

Despite the *Fieldston* court's reliance on the language of the policies before it, C&I makes no effort to demonstrate why the language of the instant policies and underlying complaints require the same result that was reached in *Fieldston*. Moreover, even if *Fieldston* stands for the proposition that insurers of different risks must always share in the defense, such a holding would not help C&I. Unlike *Fieldston*, the competing insurers in the instant case all insured the same risk—bodily injury. The court concludes, therefore, that *Fieldston* does not require Royal to share in the defense costs relating to PAL and hybrid employees prior to December 13, 2002.

b. *December 13, 2002 – August 15, 2005*
(C&I Type B. vs. Royal/Landmark)

The language of the C&I other insurance clause changed in the policy incepting December 13, 2002, but the result remains the same.[103]

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101 *Fieldston,* N.Y.S. 2d at 611.

102 *Id.*

103 In its initial briefing C&I argued that the last three C&I policies and the Royal/Landmark policies contain an identical other insurance clause which makes each primary policy excess to the others, and thus they cancel each other out. Specifically, those policies each provide that they will be excess to any other primary policy "for which you have been added as an additional insured by attachment of an endorsement." *E.g.* C&I 020001183 (C&I policy); DB 009595 (Royal policy). The mere fact that the clauses are identical, however, does not necessarily make them reciprocal. Deutsche Bank is named as an additional insured under the C&I policies, so the Royal/Landmark other insurance clause makes the Royal and Landmark policies excess to the C&I policies. The corollary is not true, however. Deutsche Bank is not an

Beginning with the primary policy incepting December 13, 2002, the C&I other insurance clause reads as follows:

> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> b. Excess Insurance
>
> This insurance is excess over:
>
> (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for your work;
>
> (b) That is Fire insurance for premises rented to you or Temporarily occupied by you with permission of the owner;
>
> (c) That is insurance purchased by you to cover your liability as a tenant for property damage to premises rented to you or temporarily occupied by you with permission of the owner; or
>
> (d) If the loss arises out of the maintenance or use of aircraft, autos or watercraft to the extent not subject to Exclusion g. of Section I – COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY.
>
> (e) Where you are an insured on a Policy for your work performed at a specific job site and that applies to a specific job site.
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement to such other primary insurance.[104]

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additional insured under the Royal and Landmark policies—it is the named insured. Consequently, the C&I other insurance clause does not make that policy excess to the Royal and Landmark policies.

[104] C&I 02001183.

The critical addition is the provision in subpart (e) that the C&I policy is excess to other primary policies.

> "Where you are insured on a policy for **your work** performed at a specific job site and that applies to a specific job site."[105]

The term "your work" is defined to include "work or operations performed by **you** or on **your** behalf."[106]

C&I, joined by Deutsche Bank, argues that the addition makes C&I's coverage excess to Royal and Landmark's because Deutsche Bank is insured on a policy (Royal and Landmark) for work performed at a specific jobsite. C&I theorizes that because its policy is excess to Royal's and Landmark's, and because the converse is also true, Royal and Landmark must share primary coverage with C&I for the affected policies.

In its first opinion, the court acknowledged that the Royal/Landmark argument has some "surface appeal," but concluded it was bound by the New York Court of Appeals decision in *Pecker Iron Works of New York v. Traveler's Ins. Co.*,[107] to reach a different result. The court also concluded that the First Circuit Court of Appeals' decision in The court also concluded that the First Circuit Court of Appeals' decision in *Wyner v. North American Specialty Ins. Co.*[108] supported its conclusion. The court now finds that it read *Pecker Iron Works* too

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105 *Id.* (emphasis added).
106 C&I 02001191 (emphasis added).
107 786 N.E.2d 863 (N.Y. 2003).
108 78 F.3d 752 (1st Cir. 1996).

broadly and that the First Circuit has recently retrenched from *Wyner* in a fashion which causes this court to conclude that the First Circuit's jurisprudence now requires a result opposite to this court's earlier decision.

In *Pecker Iron Works*, the New York Court of Appeals held that the "well understood meaning" of the term "additional insured" is an "entity enjoying the same protections as the named insured."[109] This court deduced from this language that it was impermissible under New York law to draw a distinction between named insureds and additional insureds for purposes of applying other insurance clauses.

Upon the motions for reargument, the court's own review of New York case law convinces it that the Court of Appeals in *Pecker Iron Works* never intended to abandon the familiar rule that other insurance disputes are resolved by comparing the competing clauses. In *BP Air Conditioning Corp. v. One Beacon Ins. Group*[110], the Appellate Division of the New York Supreme Court employed similar reasoning used by this court and held that *Pecker Iron Works* required the conclusion that BP Air was an additional insured under a policy issued by One Beacon's predecessor in interest. More importantly for present purposes, the Appellate Division held that *Pecker Iron Works* also required, without reference to the respective the other insurance clauses, that the additional insurance was primary and BP Air's own insurance was

[109] 786 N.E. 2d at 864.
[110] 821 N.Y.S. 2d 1 (App. Div. 2006).

excess. On appeal, the New York Court of Appeals ruled that the Appellate Division erred in this regard:

> Turning to the issue of the priority of coverage, we conclude that the Appellate Division erred in finding that One Beacon's coverage is primary and BP's coverage under its own policy is excess. **In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue** [111]

In short, even though it is commonly understood that an additional insured enjoys the same protections as the named insured, under New York law it is permissible to contractually modify that relationship. This court was therefore wrong when it concluded that Deutsche Bank's status as an additional insured under the C&I policy precluded it from comparing the other insurance clauses of the respective policies.

This court relied heavily on the First Circuit's decision in *Wyner v. North American Specialty Ins. Co.* when it concluded that it was not free to distinguish between named insureds and additional insureds for purposes of C&I's other insurance clause. Since the issuance of this court's opinion, the First Circuit announced *Wright-Ryan Construction, Inc. v. A.I.G. Insurance Co. of Canada.*[112] In *Wright-Ryan* the court considered an other insurance clause nearly identical to the one in the instant case and found that, despite *Wyner*, the term "you" in the other insurance clause referred only to the named insured:

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[111] *BP Air Conditioning Corp. v. One Beacon Insurance Group*, 871 N.E. 2d. 1128, 1133 (N.Y. 2007)(emphasis added).

[112] 647 F.3d 411 (1st Cir., 2011)

Because the district court's construction of the insurance contracts here differs so sharply from our own, we briefly address the basis for its decision. The district court relied for its rationale almost exclusively on our decision in *Wyner v. North American Specialty Insurance Co.*, 78 F.3d 752 (1st Cir.1996), another case in which we had occasion to construe the term "you" in the context of an insurance policy. There, applying Massachusetts law to interpret a provision excluding coverage for property "you own, rent or occupy," we held "you" to include not just the "Named Insured" but also anyone constituting an "Additional Insured." *Id.* at 755–56. Because the language defining "you" in the Acadia and AIG policies is apparently identical to the policy language in *Wyner,* the district court felt, not surprisingly, that our reading in *Wyner* controlled the interpretation here.

The relative ease of the interpretive question before us, along with corroborative, extrinsic evidence of the parties' intent, presents us with no pressing need to look to authority interpreting other contracts. If we were to seek such guidance, though, *Wyner* is neither the sole nor most relevant authority on the point. Decisions interpreting the use of "you" and distinguishing between the "Named Insured" and "Additional Insured" are common, due to the ubiquitous use of those terms in insurance policies:

> Insurance carriers often employ the terms "you" and "your" throughout the language of a policy. These terms are typically defined as referring to the named insured shown in the declarations of the policy, and any other person or organization qualifying as a named insured under the policy. Accordingly, "you" and "your" do[ ] not encompass individuals or entities added as an additional insured to the policy.

3 Russ & Segalla, *supra,* § 40:26 (footnote omitted). The mainstream of opinions interpreting this or similar definitions has held "you" to be unambiguous and to refer *418 solely to the individual or organization identified as the "Named Insured" in the policy Declarations. *See, e.g., Nat'l Union Fire Ins. Co. v. Liberty Mut. Ins. Co.*, 234 Fed.Appx. 190, 193 (5th Cir.2007) (taking "as a given" that, under definition of "you" identical to the definition here, "you" was limited to the named insured and did not encompass an

> additional insured); *Alexander v. Nat'l Fire Ins.*, 454 F.3d 214, 226–27 (3d Cir.2006) (same); *Seaco Ins. Co. v. Davis–Irish*, 300 F.3d 84, 86 (1st Cir.2002) (holding that definition of "you" was unambiguous and referred only to named insured).
>
> Numerous factors counsel against looking to *Wyner* for aid in interpreting the language here, among them its focus on a different type of insurance provision (an exclusionary provision), the dissimilarity of the parties and their contracting intentions (there, the policy was formed to provide coverage for a tenant and its landlord), and the rather idiosyncratic posture of the case.[FN4] Indeed, a closer fit can be found in at least two other cases from this circuit that have interpreted "you" and "your" in the precise factual setting here: CGL policies obtained by a subcontractor as a condition of work for a general contractor on a construction project. *See* *Nat'l Union Fire Ins. Co. v. Lumbermens Mut. Cas. Co.*, 385 F.3d 47, 50 (1st Cir.2004) (interpreting "your work" to refer to Named Insured subcontractor's work for Additional Insured general contractor); *Merchants Ins. Co. v. U.S. Fid. & Guar. Co.*, 143 F.3d 5, 7 (1st Cir.1998) (stating that it was "clear indeed" that "you" referred to Named Insured subcontractor). If we had any doubt about the proper interpretation of the language here, we might also find more helpful guidance in cases from other jurisdictions interpreting "you" in the context of an "Other Insurance" provision, as here. *See, e.g.*, *Alexander*, 454 F.3d at 226–27 (holding, in interpreting "Other Insurance" provision, that "you" means only "Named Insured," and noting that the fact "[t]hat someone may be an additional insured does not mean they are a Named Insured—the two terms are not interchangeable").
>
> Given the weight of the authority interpreting a CGL policy's use of the defined term "you" in circumstances similar to ours to mean solely the Named Insured, we see no reason to apply the interpretation adopted—on very different facts—in *Wyner*.[113]

The court apologizes for the lengthy quotation. However, the discussion and analysis in *Wright-Ryan,* when read in conjunction with the New

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[113] *Id. at* 417-8 (footnotes omitted)

York Court of Appeals' language in *B.P. Air,* convince the court that its earlier decision was wrong.

Having concluded that New York law does not prohibit this court from distinguishing between named insureds and additional insureds for purposes of other insurance clauses, the court agrees with Royal/Landmark that it is an excess carrier for the affected policies.

3. Exhaustion of One of the C&I Policies

The court finds that, based upon the undisputed evidence, the C&I policy for the period December 13, 2001 – December 13, 2002 is exhausted.[114] The issue thus arises which policy replaces it. Royal argues that C&I's corresponding umbrella policy[115] drops down to replace the exhausted C&I primary policy and that Royal's primary policy is excess to the dropped-down C&I policy because of the other insurance clause in the Royal primary policy.[116] The flaw in Royal's argument is that it is contrary to the law of New York.

Primary policies, such as the pertinent Royal policy, are significantly more expensive because, unlike excess policies, primary policies bear most, if not all, the burden of providing a defense.[117] According to the New York Court of Appeals, "when a policy represents

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[114] Affidavit of Lowell Chase (D.I. 243). It should be recalled that this is an eroding policy, which perhaps is why it has been exhausted and other policies (which are, for the most part, non-eroding) have not.

[115] Policy AUMB4784727.

[116] The other insurance clause in the Royal primary policy ostensibly makes that policy excess too "any other insurance, whether primary, excess [or] contingent . . . ."

[117] Deutsche Bank paid a 500,000 dollar premium for the 2002 Royal primary policy. DB 009518. PAL paid 60,080 dollars for the C&I umbrella policy. C&I 02001943.

that it will provide the insured with a defense, we have said that it actually constitutes 'litigation insurance' in addition to liability coverage."[118]

Requiring the C&I excess policy to provide a defense while the Royal primary policy acts as an excess policy would provide an unfair windfall to Royal. The New York courts have consistently rejected arguments such as Royal's for this reason. For example, in *General Motors Acceptance Corp. v. Nationwide Insurance Co.*[119] the Court of Appeals wrote:

> We are mindful of the fact that these policies were both coincidental primary policies. Primary insurance premiums are based, at least in part, on the insurer's consideration that it may be liable to defend an action. In this sense, "primary" policy premiums are higher, relatively speaking, than "excess" premiums, because the primary insurer contemplates defending a potential lawsuit when it contracts with the insured. * * * Relieving primary insurers of this duty to defend would provide a windfall to the carrier insofar as the costs of defense-litigation insurance-are contemplated by, and reflected in, the premiums charged for primary coverage. This is in contrast to a true excess, or "umbrella," policy, where the duty to defend is not as readily triggered.[120]

This principle applies to instances such as the one at bar. In New York "an excess 'other insurance' clause will not render a policy sold as primary insurance excess to a true excess or umbrella policy sold to provide a higher tier of coverage."[121] The court therefore finds that the 2002 Royal policy is the sole primary coverage at the Liberty Street site for the period January 1, 2002 through December 13, 2002 and the C&I

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118 *Automobile Ins. Co. of Hartford v. Cook,* 850 N.E.2d 1152, 1155 (N.Y. 2006).
119 828 N.E.2d 959 (N.Y. 2005).
120 *Id.* at 962.
121 *Sport Rock International, Inc.,* 878 N.Y.S. 2d at 345, n.5 (collecting cases).

Umbrella Policy is excess to it. Because the Royal policy did not become effective until January 1, 2002, the C&I Umbrella Policy is primary for the Liberty Street site for the period December 13, 2001 through January 1, 2002. Turning to the Albany Street site, the Royal policy (which insures only the Liberty Street site) is inapplicable and, therefore, the C&I Umbrella Policy provides primary coverage for claims brought by PAL and hybrid employees for that site.

4. Summary of Coverage

The foregoing conclusions result in a patchwork of coverage. The primary coverage is summarized[122] as follows:

1. Liberty Street Site

a. PAL and hybrid employees

Sept. 11 – Dec. 13, 2001 C&I

Dec. 13, 2001 – Jan. 1, 2002 C&I umbrella

Jan. 1 – Dec. 13, 2002 Royal

Dec. 13, 2002 – Jan. 1, 2004 C&I

Jan. 1, 2004 – Aug. 15, 2005 C&I

Aug. 15 – Dec. 13, 2005 C&I

b. Non-PAL employees

Jan. 1, 2002 – Jan. 1, 2004 Royal

Jan. 1, 2004 – Aug. 15, 2005 Landmark

[122] A graphic summary of the coverage is appended hereto as Appendix "A". In the event there is an inconsistency between the graphic summary and the text of this opinion, the text shall prevail.

2. Albany Street Site

a. PAL and hybrid employees

Sept. 11 – Dec. 13, 2001 C&I

Dec. 13, 2001 – Dec. 13, 2002 C&I umbrella

Dec. 13, 2002 – Oct. 20, 2004 C&I

Oct. 20, 2004 - Aug. 14, 2005 C&I and Landmark

Aug. 15 – Dec. 13, 2005 C&I

b. Non-PAL employees

Oct. 20, 2004 – Aug. 15, 2005 Landmark

D. Which Policies Pay and How Much?

1. Which Policies are Triggered?

As with most insurance coverage questions, the inquiry into which policies are triggered by a clean-up worker's claim begins with an examination of the language of the policies. Each of the policies at issue applies "only if . . . the 'bodily injury' occurs during the policy period."[123] The decision which policies are triggered[124] turns, therefore, on the seemingly simple question, when did the injury occur?

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[123] DB 009523. The quotation is from the 2002 Royal policy. The remaining primary policies all contain limitations identical to, or indistinguishable from the limitation quoted in the text.

[124] The term "trigger" does not appear in any of the policies. It is commonly used to refer to an event or events which, under the terms of the policy, give rise to the insurer's obligation to respond to the claim. *Owens-Illinois, Inc. v. United Ins. Co.,* 650 A.2d 974, 979 (N.J. 1994)

The question at hand is made complex by the often prolonged latency of the alleged injuries giving rise to the claims. As discussed previously, the clean-up workers all allege in their complaints that they were injured by exposure to toxins.[125] It is notoriously difficult to ascertain precisely when a disease begins as a result of exposure to toxins.[126] Various courts have held that the injury occurs upon the first exposure to the toxins, while still others have held that it occurs when the disease is first manifested. New York courts often apply the "injury-in-fact" test.

> Decisions on when coverage is triggered for asbestos-related injury generally may be divided into four categories: (1) on exposure to asbestos; (2) on manifestation of disease (3) on onset of disease, whether discovered or not ("injury-in-fact"); and (4) all of the above-in other words, a "continuous trigger." Federal courts have concluded that the "injury-in-fact" rule is most consistent with New York law.[127]

The injury-in-fact test "rests on when the injury, sickness, disease or disability actually began."[128] The test, then, is to examine the allegations in the complaint and determine the earliest possible date for the onset of the disease and the latest possible date for the onset of the disease.

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125 See text accompanying footnote 6, *et seq*. for a discussion of the clean-up workers' claims.

126 *Insurance Co. of North America v. Forty-Eight Insulation, Inc.*, 633 F.2d 1212, 1218 (6th Cir. 1980) ("it is almost impossible for a doctor to look back and testify with any precision as to when the development of asbestos 'crossed the line' and became a disease."); *John Crane, Inc. v. Scribner*, 800 A.2d 727, 741 (Md. 2002) (referring to "practical impossibility" of ascertaining "with any degree of precision" when onset of disease resulting from exposure to toxins actually occurred).

127 *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 511 (N.Y. 1993)(internal citations omitted).

128 *Id.*

Most, if not all, of the clean-up workers do not allege when their disease began, and many do not allege when they were first exposed to toxins or when their disease first manifested itself.[129] This does not impede the ability of the parties and the court to determine which policies are triggered because that determination is made on the basis of traditional principles of the duty to defend.[130] "[A]n insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest … a reasonable possibility of coverage."[131] Stated somewhat differently, coverage is triggered unless the allegations "exclude the possibility that injury-in-fact occurred during the policy period."[132] The court, therefore, holds that, in the absence of an allegation when the illness first began, the following allegations will trigger a policy: The latest of (1) the date the worker alleges he or she was first exposed to toxins; (2) if there is no allegation about first exposure, the date the worker alleges he or she worked at a covered site; or (3) if no such

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[129] *See Continental Cas. v. Employers Ins. Of Wausau*, 865 N.Y.S. 2d 855, 860-1 (N.Y. Sup. 2008) (rejecting argument that insurer had no duty to defend where underlying information on locations and times of exposure was omitted from standardized complaint).

[130] *See Continental Cas. Co. v. Employers Ins. Co of Wausau,* 865 N.Y.S.2d 855 (App. Div. 2008) (court able to determine which site and time specific policies implicated for purposes of duty to defend notwithstanding frequent omission of key information by underlying plaintiffs in standardized form asbestos complaints).

[131] *B.P. Air Conditioning Corp. v. One Beacon Ins. Co.*, 871 N.E. 2d 1128, 1131 (N.Y. 2007).

[132] *Courtland Pump & Equipment, Inc. v. Fireman's Ins. Co. of Newark, N.J.*, 604 N.Y.S. 2d 633, 636 (N.Y. App. Div. 1993).

allegation is made, the date Deutsche Bank began its clean up efforts.[133] Conversely, the last policy to be triggered is as follows:

> 1. The date the worker alleges that his or her disease manifested itself or was diagnosed. In the event that the worker alleges he or she suffered from multiple diseases, the last date of manifestation or diagnosis shall be the ending trigger.
>
> 2. If the worker does not allege a date of manifestation or diagnosis, the ending trigger shall be the date the complaint was filed.
>
> 3. In the event the worker files claims that additional diseases manifested themselves after the filing of the complaint, the ending trigger shall be the earlier of the following: (a) the date the additional diseases manifested themselves or were diagnosed or (b) the last date of coverage.

All applicable policies between the first and last triggered policies are also triggered.

2. Allocation

In matters in which coverage is provided by only one carrier and the policies are not eroding, it is unnecessary to allocate defense costs between the various policies. In this case, however, the different carriers are at various times on the same risk and some of the policies are eroding. Consequently, it is necessary to apportion the defense costs among the various policies.

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[133] The court acknowledges the seeming incongruity of determining the earliest possible date of onset by first examining the latest of several mileposts. The logic is sound, however. For example if the worker alleges the first date on which he was exposed to toxins (the latest milepost), the onset of his or her disease could not have occurred before then, in which case there is no need to examine earlier mileposts.

There is no set formula for allocating defense costs among different policies. Rather the goal is to achieve an equitable allocation irrespective of the method used.

> We think decisional law supports the notion that the resolution of this case hinges on equitable principles. Those basic principles are widely accepted. Contribution rights, if any, between two or more insurance companies insuring the same event are not based on the law of contracts. This follows from basic common sense because the contracts entered into are formed between the insurer and the insured, not between two insurance companies. Accordingly, whatever rights the insurers have against one another do not arise from contractual undertakings. By the same token, the contract of settlement an insurer enters into with the insured cannot affect the rights of another insurer who is not a party to it. Instead, whatever obligations or rights to contribution may exist between two or more insurers of the same event flow from equitable principles.[134]

There are at least two widely accepted means of allocating defense and indemnification costs. One is similar to joint and several liability, which allows the insured to collect all of its losses from one insured and let the carriers slug it out in an action for contribution.[135] This form of allocation is commonly referred to as "joint and several allocation." The other is to make some sort of pro rata allocation, usually on the basis of the time on the risk, the comparative policy limits or a combination of these two factors. The New York courts are divided on which method is preferable. "Where, as here, an alleged continuous harm spans many years and thus implicates several successive insurance policies, courts

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[134] *Maryland Casualty Co. v. W.R. Grace and Co.*, 218 F.3d 204, 210-11 (2d Cir. 2000) (citations omitted).

[135] *E.g., Keene Corp. v. Insurance Corp. of North America,* 667 F.2d 1034, 1051 (D.C. Cir. 1981).

have split as to whether each policy is liable for the entire loss, or whether each policy is responsible only for a portion of the loss."[136]

Some courts have criticized pro-rata allocations of indemnification obligations in cases involving exposure to toxins because such allocations assume a linear progression of the disease-causing process during the latency period, an assumption which has apparently yet to be substantiated by scientific analysis.[137] But the use of joint and several allocation in cases involving exposure to toxins presupposes it is possible to determine when the disease actually began. While this may be theoretically feasible after a trial on the merits, no such determination can be made at this stage of the underlying litigation. The court, therefore, is not inclined to adopt that method in allocating defense costs.

The New York Court of Appeals has upheld, but not mandated, the use of the pro rata method in allocating defense costs in toxic exposure cases.[138] A few years later the same court, in *Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co,*[139] had occasion to examine the allocation of damages among several insurers in a pollution case. The court's treatment of that issue is instructive here. It began its analysis by examining the language of the respective policies which, like the

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136 *Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co*, 774 N.E.2d 687, 693 (N.Y. 2002).

137 *Koppers Co. v. Aetna Cas. & Sur. Co.,* 98 F.3d 1440, 1450-51 (3d Cir. 1996).

138 *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506 (N.Y. 1993) ("When more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered.").

139 774 N.E.2d 687 (N.Y. 2002).

policies in the instant case, required payment of "all sums" the insured is obligated to pay for an "occurrence" taking place during the policy period. It found that joint and several allocation was inconsistent with the policy language because of the futility of attempting to determine when the "occurrence" took place. The court opted, instead, for pro rata allocation:

> Pro rata allocation under these facts, while not explicitly mandated by the policies, is consistent with the language of the policies. Most fundamentally, the policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period. * * * Proration of liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period.[140]

Although *Consolidated Edison* concerned allocation of indemnity payments, the court can think of no reasoned argument why the result would differ in the context of defense costs. Practical and equitable considerations also steer this court in that same direction. As a practical matter, the use of joint and several allocation has the potential to result in nearly 300 suits for contribution. That method would also unfairly put Royal and Landmark, which issued non-eroding policies, at risk of being unable to obtain contribution for defense costs from the two C&I eroding policies which may be exhausted.[141]

What is the best basis for making the pro rata allocation? The time-on-the-risk approach provides an easily applied and fair method of allocating defense costs. Moreover, the primary policy limits are either

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[140] *Id.* at 695.

[141] Because there will be no subsequent suits for contribution for payment of defense costs, the court need not decide whether Royal and Landmark could obtain contribution from C&I's excess policies.

one or two million dollars, and therefore no policy will be allocated a share of the defenses costs which is grossly disproportionate to its indemnity exposure.

> Given that there is no way of knowing for sure when an asbestos-caused disease actually begins, that is the fairest way of allocating coverage, and so as to not have an unusually, overly complicated formula of pro ration, it should be done evenly per year of site exposure. Where a site is excluded under an insurer's policy, then that insurer will not have to provide coverage for that site for the excluded time period. So, for example, if an underlying plaintiff was exposed to asbestos at Indian Point Units 2 and/or 3 for two years and other sites for 18 years, then the coverage will be allocated 10% for Indian Points 2 and/or 3 and 90% for the other sites. The court will declare as to such a method of allocation.[142]

The court further notes that the primary policies at issue have limits of either one or two million dollars, so a pro rata allocation based upon time-on-the-risk will not yield allocations which are wildly disproportionate to the respective insurer's indemnification obligations.

In cases involving long-term exposure courts sometimes measure time-on-the-risk by the number of years on the risk. But here the risk spans only the period between September 11, 2001 and August 5, 2005 and thus a finer measure is needed. The court will, therefore, measure time-on-the-risk in terms of months. If a policy is triggered for any portion of a month, an entire month will be attributed to that policy's time-on-the-risk.

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[142] *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 865 N.Y.S.2d 855, 863 (Sup. 2008).

Finally, the court needs to briefly consider how defense costs are allocated when Deutsche Bank was uninsured during a portion of the risk. On October 24, 2004 Landmark extended coverage to Deutsche Bank for the Albany Street site. Deutsche Bank had previously been uninsured with respect to non-PAL workers at that site. The court finds that Landmark must pay the entire cost of defense for any non-PAL worker claims stemming from the Albany Street site if those claims trigger the Landmark policy. At first blush it may seem unfair to require Landmark to pay the entire defense costs even though Deutsche Bank was uninsured for much of that time. To be sure, one federal court, in the course of predicting New York law, applied a "pro ration to the insured" method in allocating indemnification costs. This method requires the insured to contribute to the indemnification on a pro rata basis to account for the periods when it was uninsured.

The pro ration to the insured method does not work in the context of the duty to defend. It is settled that once an insurer has a duty to defend one claim in a suit it must provide a defense to all claims to its insured. Once a non-PAL worker's claim triggers the Landmark policy, Landmark must provide a complete defense to Deutsche Bank even if the worker's complaint could be construed as also alleging that the injury was caused during the period when Deutsche Bank was uninsured. In such instances Landmark's recourse is to seek contribution from Deutsche Bank if resolution of the worker's suit demonstrates that the

injury was caused during the uninsured period. In *Continental Casualty Co. v. Rapid–American Corp.,*[143] the New York Court of Appeals reached this result, writing:

> Similarly, the allegation that Rapid was self-insured for a period of time predating the CNA coverage cannot operate to deny Rapid the complete defense to which it is entitled under the CNA policies in the event of overlapping occurrence periods. The question whether the insured itself must contribute to defense costs—an issue on which courts have divided—is appropriately deferred at least until such time as the underlying lawsuits are shown to involve "occurrences" during self-insured periods. In any event, issues of fact concerning whether Rapid was self-insured for any period make this determination inappropriate for summary judgment.[144]

In the event, therefore, that a non-PAL employee's claim arises from the Albany Street site and triggers a Landmark policy between October 20, 2004 and August 15, 2004, Landmark will be required at this juncture to pay the entire cost of defense even though the claim may arguably have arisen during a period in which Deutsche Bank was uninsured for non-PAL employees at the Albany Street site.

IV. SUMMARY

The court's rulings are summarized as follows:

A. Deutsche Bank is an additional insured under the C&I policy. It shall provide coverage for claims made by PAL and hybrid

143 609 N.E.2d 506 (N.Y. 1993)
144 *Id.* at 514.

employees except for those claims which were untimely noticed to C&I and C&I timely denied coverage.

B. The C&I primary policy incepting December 13, 2001 is exhausted.

C. The defendants are obligated to provide primary coverage as follows:

1. 130 Liberty Street Site

a. PAL and hybrid employees

Sept. 11 – Dec. 13, 2001 C&I

Dec. 13, 2001 – December 13, 2002 C&I umbrella

Dec. 13, 2002 – December 13, 2005 C&I

b. Non-PAL employees

Jan. 1, 2002 – December 1, 2003 Royal

December 1, 2003 – Aug. 15, 2005 Landmark

2. 4 Albany Street Site

a. PAL and hybrid employees

Sept. 11 – Dec. 13, 2001 C&I

Dec. 13, 2001 – Dec. 13, 2002 C&I umbrella

Dec. 13, 2002 – December 13, 2005 C&I

b. Non-PAL employees

Oct. 20, 2004 – Aug. 15, 2005 Landmark

D. Triggers

1. The latest of the following events will trigger the first policy:

a. The date when the worker alleges he or she was first exposed to toxins.

b. If the worker does not allege the date when he or she was first exposed to toxins, the date when the worker first worked at one of the covered sites.

c. If the worker does not allege when he or she first began to work at one of the covered sites, the first date when Deutsche Bank began its clean-up efforts.

2. The ending trigger dates are as follows:

a. The date the worker alleges that his or her disease manifested itself or was diagnosed. In the event that the worker alleges he or she suffered from multiple diseases, the last date of manifestation or diagnosis shall be the ending trigger.

b. If the worker does not allege a date of manifestation or diagnosis, the ending trigger shall be the date the complaint was filed.

c. In the event the worker files claims that additional diseases manifested themselves after the filing of the complaint, the ending trigger shall be the earlier of the following: (i) the date the additional diseases manifested themselves or were diagnosed or (ii) the last date of coverage.

E. Allocation. The costs of defense will be allocated among all triggered policies on a pro rata basis according to time-on-the-risk, measured in months. A fraction of a month shall be deemed an entire month for this purpose.

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John A. Parkins, Jr.
Superior Court Judge

Dated: May 30, 2012

oc: Prothonotary