

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
UNION CARBIDE CORPORATION,

Plaintiff,

-against-

Index No.: 600804-04  
Corrected Opinion

AFFILIATED FM INSURANCE COMPANY;  
APPALACHIAN INSURANCE COMPANY; COLUMBIA  
CASUALTY COMPANY; CONTINENTAL CASUALTY  
COMPANY; AIU INSURANCE COMPANY; ALLSTATE  
INSURANCE COMPANY (AS SUCCESSOR IN  
INTEREST TO NORTHBROOK EXCESS AND  
SURPLUS INSURANCE COMPANY, F/K/A  
NORTHBROOK INSURANCE COMPANY); AMERICAN  
HOME ASSURANCE COMPANY; AMERICAN  
MOTORISTS INSURANCE COMPANY; AMERICAN  
RE-INSURANCE CORPORATION; COMMERCIAL  
UNION INSURANCE COMPANY (AS SUCCESSOR IN  
INTEREST TO EMPLOYERS' COMMERCIAL UNION  
INSURANCE COMPANY; THE EMPLOYERS'  
LIABILITY ASSURANCE CORPORATION, LTD.  
AND EMPLOYERS' SURPLUS LINES INSURANCE  
COMPANY); EMPLOYERS MUTUAL CASUALTY  
COMPANY; EVEREST REINSURANCE COMPANY  
(F/K/A PRUDENTIAL REINSURANCE COMPANY);  
FEDERAL INSURANCE COMPANY; GENERAL  
REINSURANCE CORPORATION; GRANITE STATE  
INSURANCE COMPANY; HIGHLANDS INSURANCE  
COMPANY; LEXINGTON INSURANCE COMPANY;  
ALLIANZ INTERNATIONAL INSURANCE COMPANY  
LTD.; ALLIANZ VERSICHERUNGS  
AKTIENGESELLSCHAFT A.G.; AMERICAN HOME  
ASSURANCE COMPANY; ANCON INSURANCE  
COMPANY (UK) LTD.; ASSICURAZIONI  
GENERALI DI TRIESTE E VENEZIA, SOCIETA  
PER AZIONI; BRITTANY INSURANCE COMPANY  
LTD.; CHEMICAL INSURANCE COMPANY;  
COMPAGNIE D'ASSURANCES MARITIMES  
AERINNES ET TERRESTRES; COMPAGNIE  
EUROPEENNE D'ASSURANCES INDUSTRIELLES  
S.A.; THE DRAKE INSURANCE COMPANY LTD.;  
EISEN UND STAHL RUCK VERSICHERUNGS;  
FIRST STATE INSURANCE COMPANY LTD.;  
FOLKSAM INTERNATIONAL INSURANCE COMPANY  
(UK) LTD.; FORSAKRINGS A/B SIRIUS; HAWK  
INSURANCE COMPANY, LTD.; HEDDINGTON  
INSURANCE (UK) LTD.; HIGHLANDS INSURANCE  
COMPANY (UK) LTD.; INDEMNITY GUARANTEE  
ASSURANCE LTD.; INSCO LIMITED; ITALIA  
ASSICURAZIONI; LA PRESERVATRICE;

LEXINGTON INSURANCE COMPANY; MITSUI  
SUMITOMO INSURANCE COMPANY (EUROPE),  
LTD. (F/K/A TAISHO MARINE & FIRE  
INSURANCE COMPANY (UK) LTD.);  
NEWFOUNDLAND AMERICAN INSURANCE COMPANY,  
LTD.; NISSHIN FIRE & MARINE INSURANCE  
COMPANY LTD.; REASEGURADORA NACIONAL SA;  
STOREBRAND INSURANCE COMPANY (UK) LTD;  
TOKIO MARINE & FIRE INSURANCE COMPANY  
(UK) LTD.; UNION SUISSE COMPAGNIE  
GENERAL D'ASSURANCES OF GENEVA;  
WINTERTHUR SWISS INSURANCE COMPANY;  
LUMBERMENS MUTUAL CASUALTY COMPANY; MT.  
MCKINLEY INSURANCE COMPANY (F/K/A  
GIBRALTAR CASUALTY CO.); NATIONAL  
CASUALTY COMPANY; NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA; NEW  
HAMPSHIRE INSURANCE COMPANY; NORTH STAR  
REINSURANCE CORPORATION; OLD REPUBLIC  
INSURANCE COMPANY; PEERLESS INSURANCE  
COMPANY; RIUNIONE ADRIATICA DI SICURTA  
S.P.A.; SEATON INSURANCE COMPANY (F/K/A  
UNIGARD MUTUAL INSURANCE COMPANY); ST.  
PAUL FIRE AND MARINE INSURANCE COMPANY;  
THE TRAVELERS INDEMNITY COMPANY; SENTRY  
INSURANCE COMPANY (F/K/A GREAT SOUTHWEST  
FIRE INSURANCE COMPANY); WESTPORT  
INSURANCE CORPORATION (F/K/A MANHATTAN  
FIRE & MARINE INSURANCE COMPANY, F/K/A  
PURITAN INSURANCE COMPANY), ARGONAUT  
INSURANCE COMPANY; ATLANTA INTERNATIONAL  
INSURANCE COMPANY (SUCCESSOR IN INTEREST  
TO DRAKE INSURANCE COMPANY OF NEW YORK);  
ASSURANCES GROUPES JOSI S.A.-N.V.;  
COMPAGNE BELGE D'ASSURANCES GENERALES;  
HAENECOUR & CO. S.A.; ROYALE BELGE S.A.;  
L'UNION ATLANTIQUE DE REASSURANCES;  
BIRMINGHAM FIRE INSURANCE COMPANY OF PA;  
CENTENNIAL INSURANCE COMPANY; and  
CENTRAL NATIONAL INSURANCE COMPANY OF  
OMAHA,

Defendants

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**Charles Edward Ramos, J.S.C.:**

Motion sequence numbers 023 to 031 are consolidated for  
disposition.

Plaintiff Union Carbide Corporation (UCC) instituted this declaratory judgment action to determine whether defendant insurers are obligated to provide coverage under certain excess umbrella liability policies.<sup>1</sup> These motions raise the issue of whether the aggregate limits of liability contained in eight of the policies apply to the entire three-year policy term, or separately, on an annualized basis, thereby greatly enlarging the insurers' exposure.

In motion sequence number 022, defendants Continental Casualty Company (Continental) and Appalachian Insurance Company (Appalachian) jointly move for partial summary judgment (CPLR 3212).

In motion sequence numbers 023 and 027, defendants Lumbermans Mutual Casualty Company (LMC) and American Motorists Insurance Company (AMICO) jointly move for partial summary judgment (CPLR 3212), and seek a declaration that the excess liability policies at issue provide for a single aggregate limit of liability for the policy period.

In motion sequence number 024, defendant American Re-Insurance Company (American Re) moves for partial summary judgment (CPLR 3212).

In motion sequence number 025, defendant American Home Assurance Company (American Home) moves for partial summary

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<sup>1</sup> Under New York law, excess insurance is coverage that attaches only after a predetermined amount of underlying primary insurance has been exhausted (*In re September 11<sup>th</sup> Liab. Ins. Coverage Cases*, 458 F Supp 2d 104 [SD NY 2006]).

judgment (CPLR 3212). In doing so, American Home adopts and incorporates Continental's legal arguments.

In motion sequence number 026, plaintiff UCC moves for partial summary judgment (CPLR 3212), and seeks a declaration that the excess liability policies at issue provide for annualized aggregate limits of liability.

In motion sequence number 028, defendant Argonaut Insurance Company (Argonaut) cross-moves for partial summary judgment (CPLR 3212). In doing so, Argonaut adopts and incorporates Continental's legal arguments.

In motion sequence number 029, defendant St. Paul Fire and Marine Insurance Company (St. Paul) moves for partial summary judgment (CPLR 3212), and seeks a declaration that the excess liability policies at issue provide for a single aggregate limit of liability for the policy period.

In motion sequence numbers 030 and 031, defendants LMC and AMICO move for an order to permit James A. Pinderski, Esq. and Daneen Fitzpatrick Berres, Esq. to be admitted pro hac vice and appear before this court as their counsel, pursuant to § 520.11 of the Rules of the Court of Appeals and § 602.2 (a) of the Rules of the Appellate Division, First Department.

### **Background**

Between 1967 and 1977, UCC purchased umbrella excess liability policies to cover asbestos products-related liabilities. The coverage that UCC purchased pursuant to the excess policies involved here (Excess Policies), was issued in

successive layers, and was intended to provide continuous coverage. Five of the eight Excess Policies are jointly executed "subscription form" policies, whereby multiple insurance carriers agreed to provide "quota share" coverage to UCC. Under quota share coverage, participating carriers share limits of liability and premiums, and agree to the same policy terms, in lieu of issuing multiple, stand-alone policies.

Additionally, the Excess Policies are "follow form" policies, i.e., their terms and conditions of coverage incorporate and conform to, subject to certain qualifications and exceptions, a designated, underlying policy. The Excess Policies contain nearly identical follow form clauses,<sup>2</sup> designating three underlying excess<sup>3</sup> policies (Underlying Policies). The follow form clauses of the Excess Policies state:

"[i]n consideration of the premium paid and subject to the declarations set forth below . . . the Insurance afforded by this agreement shall follow all the terms, insuring agreements, definitions, conditions and exclusions of underlying Excess Liability Policies Number . . . (Exhibits 1, 3, 4, 5, 6, 7, 8, annexed to the Affidavit of Steven R. Gilford, Esq.)."

Further, each of the Excess Policies has a three-year policy term.

### **The Excess Policies**

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<sup>2</sup> The language of each of the follow form clauses contain slight variations from one another, but are, otherwise, substantively similar.

<sup>3</sup> Seven of the eight excess liability policies follow form to underlying excess policies; the remaining excess liability policy follows form to an underlying primary policy (Exhibit 2, annexed to the Affidavit of Steven R. Gilford, Esq.).

The first Excess Policy, issued by American Home (Exhibit 1, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to policy number E15-8274-001 (Underlying Policy 1). The policy states:

"Coverage: Excess Following Form Umbrella Liability  
Limit of Liability: \$5,000,000 part of \$20,000,000 excess of \$20,000,000 and as more fully described in [Underlying Policy 1]"

The second excess policy was issued by Appalachian (Exhibit 2, annexed to the Affidavit of Steven R. Gilford, Esq.), and follows form to Underlying Policy 1, which is the primary policy. Endorsement No. 1 to the policy states:

"Limit of Liability: \$2,000,000 each occurrence or accident \$2,000,000 aggregate"

The next five Excess Policies issued to UCC are subscription form policies.

The first subscription form policy (Exhibit 3, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to Underlying Policy 1 and policy number E15-8274-006 (Underlying Policy 2). The policy states:

"Coverage: Excess following form Umbrella and Marine Liability Policy  
Limit of Liability: \$20,000,000 Umbrella Liability each occurrence and in the aggregate excess of \$20,000,000 as provided by [Underlying Policy 2]"

The signature page of the policy states that the subscribing insurers agree to insure "to an amount not exceeding that percentage . . . set opposite the name of such Company." Further, it states, "This policy being for \$20,000,000." Opposite American Home's signature, it states \$5,000,000, and

opposite Appalachian's signature it states \$2,000,000.

The second subscription form policy (Exhibit 4, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to Underlying Policy 2. The policy states:

"Coverage: Excess following form Umbrella Liability Policy  
Limit of Liability: \$21,000,000 Umbrella Liability each occurrence and in the aggregate . . . as provided by scheduled excess policies."

The signature page is identical to the signature page contained in the first subscription form policy, except that the total limit of liability is \$21,000,000.

The third subscription form policy (Exhibit 5, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to two underlying excess policies that are replaced by policy number 71182, issued by Appalachian (Underlying Policy 3). The policy states:

"Coverage: Excess following form Umbrella and Marine Liability Policy  
Limits of Liability: \$20,000,000 Umbrella Liability each occurrence and in the aggregate as provided by [Underlying Policy 3."

The signature page is identical to the signature pages contained in the other subscription form policies, and the total limit of liability is \$20,000,000.

The fourth subscription form policy (Exhibit 6, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to Underlying Policy 3. The policy states:

"Coverage: Excess following form Umbrella and Marine Liability Policy  
Limit of Liability: \$30,000,000 each occurrence and in the aggregate"

The policy contains an identical signature page, and the total limit of liability is \$30,000,000.

The fifth subscription form policy (Exhibit 7, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to Underlying Policy 3. The policy states:

"Sum Insured: \$10,000,000 part of \$30,000,000 each occurrence (aggregate limits where applicable)."

The policy contains an identical signature page, and the total limit of liability is \$30,000,000.

The sixth subscription form policy (Exhibit 8, annexed to the Affidavit of Steven R. Gilford, Esq.), follows form to Underlying Policy 3. The policy states:

"Coverage: Excess following form Umbrella and Marine Liability Policy  
Limit of Liability: \$30,000,000 each occurrence and in the aggregate"

The policy contains an identical signature page, and the total limit of liability is \$30,000,000.

### **The Underlying Policies**

Under the "Conditions" section of Underlying Policy 1 (Exhibit A, annexed to the Affidavit of Steven R. Gilford, Esq.), "Limits of Liability" is defined as follows:

"the **limit of liability** so set forth as '**aggregate**' shall be the total limit of the company's liability under this policy for ultimate net loss: (1) because of all personal injury and property damage **during each consecutive twelve-months of the policy period**, arising out of the Products-Completed Operations Hazards" (emphasis added) (*id.* at 8).

"Limits of Liability" in the "Conditions" sections of Underlying Policies 2 and 3 (Exhibit B, C, annexed to the

Affidavit of Steven R. Gilford, Esq.), is defined identically as in Underlying Policy 1 (*id.* at 8).

UCC contends that the multi-year Excess Policies provide for annualized aggregate limits of liability, entitling it to approximately \$165 million in insurance coverage. In support of its motion for partial summary judgment, UCC maintains that, although the Excess Policies do not contain the term "annual," the language of the Underlying Policies, from which the Excess Policies follow form, explicitly annualize aggregate limits. Further, UCC contends that, to the extent that the Excess and Underlying Policies contain ambiguous terms, extrinsic evidence in the form of industry custom and usage, and UCC's own practices, establish that the parties intended the limits of liability of the Excess Policies to apply on an annual basis.

In contrast, defendants move for partial summary judgment, collectively arguing that the aggregate limits of liability of the Excess Policies are applicable to the entire three-year policy term. Defendants contend that, under New York law, where limits of liability set forth in the declarations page of a multi-year excess policy do not contain the term "annual," courts will not find that such a term is incorporated into the policies, even where, as here, the policies follow form to another policy that does provide for annualized aggregate limits.

Additionally, defendants argue that, because the Excess Policies follow form to the Underlying Policies "subject to" the declarations of the Excess Policies, and the Excess Policies do

not contain the term "annual," but contain a three-year policy period, the aggregate limit of liability necessarily covers the three-year policy period.

Furthermore, defendants take the position that the Excess and Underlying Policies contain conflicting terms of coverage, and thus, the Excess Policies, which do not contain the term "annual," are controlling.

### **Discussion**

In order to obtain summary judgment, a party must make a prima facie showing of entitlement to judgment as a matter of law, after which the burden shifts to the opposing party to establish the existence of admissible evidence sufficient to raise a disputed issue of fact (*Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562 [1<sup>st</sup> Dept 2006], *lv dismissed* \_ NY2d \_ [2007]).

Under New York law, the initial interpretation of an insurance contract is a matter of law for the court to decide based upon the specific language of the policies (*State v Home Indem. Co.*, 66 NY2d 669, 671 [1985]).

A "follow form" policy for excess insurance coverage incorporates by reference the terms of the underlying policy, except insofar as the excess policy provides otherwise, expanding the four corners of the excess policy to include non-contradictory terms of the underlying policy (*Travelers Cas. & Sur. Co. v Ace Am. Reins. Co.*, 392 F Supp 2d 659, 663-64 [SD NY 2005], *aff'd* 2006 WL 2990204 [2d Cir 2006]). Thus, in the event

that the underlying policy contains a conflicting term of coverage, the excess policy controls an insurer's obligations (*Home Ins. Co. v American Home Prods. Corp.*, 902 F2d 1111, 1113 [2d Cir 1990]; accord *Uniroyal Inc. v American Re-Ins. Co.*, 2005 WL 4934215, \*5-6 [NJ Super 2005], cert denied 895 A2d 450 [Sup Ct NJ 2006] [applying New York law]). However, in the event that the excess policy, containing a follow form clause which incorporates non-contradictory terms of the designated underlying policy, is silent as to a term, the underlying policy language is controlling (*id.*).

For the reasons stated below, the aggregate limits of liability of the Excess Policies apply on an annualized basis, based upon the follow form clauses, which adopt and incorporate the non-conflicting terms, definitions and conditions of the Underlying Policies.

The Excess Policies follow form and incorporate the terms, definitions, and conditions of the three Underlying Policies, "subject to the declarations" set forth in the Excess Policies (see Exhibits 1-8, annexed to the Affidavit Steven R. Gilford, Esq.). Thus, based upon the follow form clauses in the Excess Policies, the Underlying Policies are incorporated by reference into the Excess Policies, except insofar as they conflict with the declarations of the Excess Policies.

Each of the Excess Policies' declarations page contains a three-year policy period and a follow form clause, and additionally states that coverage is "Excess following form

Umbrella and Marine Liability Policy.” Each of the “Limit of Liability” sections in the declarations pages state a dollar amount, followed by the phrase “each occurrence and in the aggregate.”

The declarations pages of the Excess Policies do not contain any definition of “limit of liability,” “occurrence” or “aggregate.” Further, the term “annual” does not appear anywhere on the declarations pages of the Excess Policies, and neither is there language defining the applicable coverage period for “occurrence” and “aggregate.”

However, the “Conditions” section of each of the Underlying Policies does define the applicable coverage period for “aggregate limits of liability.” Each of the Conditions sections state:

“the limit of liability so set forth as ‘aggregate’ shall be the total limit of the company liability under this policy for ultimate net loss: (1) because of all personal injury and property damage during each consecutive twelve months of the policy period, arising out of the Products-Completed Operations Hazards” (Exhibits A, B, C, annexed to the Affidavit of Steven R. Gilford, Esq. at 8).

Accordingly, the follow form clauses of the Excess Policies manifest the parties’ intent to look to the Underlying Policies to determine coverage, provided that no conflicts are thereby created. Given that the declarations pages of the Excess Policies are completely silent as to the definitions, terms or conditions of “aggregate,” in addition to the coverage period applicable to the “aggregate limit of liability,” while each of the Underlying Policies explicitly state that the “limit of

liability" described as "aggregate" shall be the insured's total loss occurring in twelve months of the policy period, pursuant to the follow form clauses, that "Condition" of the Underlying Policies is necessarily incorporated into the Excess Policies and is controlling. "Where a[n] [insurance] policy defines a term, that definition is to be used (*Unimax Corp. v Lumbermens Mut. Cas. Co.*, 908 F Supp 148, 153 [SD NY 1995]).

Further, the Excess Policies' silence as to an aspect of coverage that is expressly provided for in the Underlying Policies does not create a contradiction between them. Rather, the follow form clauses establish that the condition provided for in the Underlying Policies is intended to be incorporated into the Excess Policies.

Moreover, because no ambiguity exists in the language of the Excess and Underlying Policies, the court will not consider extrinsic evidence. A party may submit extrinsic evidence to aid in the construction of terms only where an ambiguity exists (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]). A provision of an insurance policy is not ambiguous merely because the parties interpret it differently (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 27 [1<sup>st</sup> Dept 2003]; see also *Pereira v National Union Fire Ins. Co. of Pittsburgh, PA.*, 2006 WL 1982789, \*4 [SD NY 2006]). Rather, an insurance contract is ambiguous if the language is susceptible to more than one interpretation (*Broad St., LLC v Gulf Ins. Co.*, AD3d, 2006 WL 3593049 [1<sup>st</sup> Dept 2006]).

Here, the term "aggregate" is not ambiguous, but is susceptible to only one meaning, i.e., the definition provided for in the Conditions section of the Underlying Policies, which expressly annualizes aggregate limits of liability, and thus, the court will not consider extrinsic evidence (*accord Travelers Cas. & Sur. Co.*, 392 F Supp 2d at 663-65; *see also Travelers Cas. & Sur. Co.*, 2006 WL 2990204 at \*1; *Commercial Union Ins. Co. v Swiss Reins. Am. Corp.*, 413 F3d 121, 128 [1<sup>st</sup> Cir 2005]).

In *Travelers Cas. & Sur. Co.* (392 F Supp 2d at 663-65; 2006 WL 2990204 at \*1), the district court and reviewing appellate court considered the limits of liability applicable to certificates that provided reinsurance for three-year excess policies, and followed form to non-contradictory terms of underlying excess policies. The certificates used the term "each occ. -agg." to describe limits of liability, but the terms were not otherwise defined, nor did the certificates state whether the limits of liability covered the three-year policy period or on an annual basis (*id.*). The underlying policies, from which the certificates followed form, explicitly provided that aggregate limits of liability were to be applied on an annualized basis (*id.*). The courts both concluded that based upon the follow form clause of the certificates, the annualized aggregate limits of liability were presumed to apply to the certificates.

While defendants correctly point out that reinsurance policies contain "follow the fortunes" clauses, which is inapplicable here, both reinsurance and insurance policies are to

be interpreted under contract law (*Excess Ins. Co. Ltd. v Factory Mut. Ins.*, 3 NY3d 577, 582 [2004]). In *Travelers Cas. & Sur. Co.* (392 F Supp 2d at 663-65; 2006 WL 2990204 at \*1), the courts expressly relied upon principles of contract interpretation, rather than reinsurance, in order to find that annualized aggregate limits of liability applied to the certificates, based upon the follow form clause. The Second Circuit stated:

"The follow form clause required the district court to presume that the liability limits of the Certificates applied in a manner concurrent with those of the Policies. That presumption is not a matter of law, but a matter of simple contract interpretation" (*Travelers Cas. & Sur. Co.*, 2006 WL 2990204 at \*1).

Defendants point to other policy language to support its assertion that the aggregate limits of liability apply to the entire, three-year policy period. They rely upon the signature pages of the subscription form Excess Policies, which state that "each of the Companies named upon the signature pages of this agreement. . . [is] insuring to an amount not exceeding that. . . set opposite the name of such Company" (Exhibits 3, 4, 5, 6, 8, annexed to the Affidavit of Steven R. Gilford). Thereafter, the signature pages state, "each of the signatories [insurers] assumes . . . their indicated quota share amount of the total [x amount] . . . limit of liability" (*id.*).

Defendants argue that if the term "annual" were incorporated into the signature pages based upon the follow form clauses, the result achieved would be that the "total [x amount] limit of liability," in addition to the amount listed opposite each insurers' name, would be multiplied by three, covering each year

of the three-year policy period. Thus, defendants argue, if the "total [x amount] limit of liability" stated in the signature pages is annualized, the amount the insurers would be obligated to pay differs from the amount listed opposite their names in the five subscription form Excess Policies, thereby creating a contradictory term.

Defendants misinterpret the language of the Excess Policies, however. The phrase "total [x amount] limit of liability," listed on the signature pages, does not define or describe how the limits of liability are to be applied. Thus, while the language of the Excess Policies unambiguously states that each insurer agrees to be liable for a certain percentage of the "total [x amount] limit of liability," there is no language indicating that the percentage of the quota share and the amount listed opposite the insurers' name is to be paid to the insured each consecutive year of the policy period, or one time only.

Further, the Underlying Policies utilize nearly identical terminology as that stated in the signature pages, to describe the applicable coverage period for aggregate limits of liability (Exhibits A, B, C, annexed to the Affidavit of Steven R. Gilford, Esq. at 8 ["the limit of liability so set forth as 'aggregate' shall be the total limit of the company's liability under this policy"]).

Therefore, because the operative language of the follow form clauses of the Excess Policies clearly incorporate the conditions of the Underlying Policies, the aggregate limits of liability for

the Excess Policies apply on an annual basis.

Defendants additionally assert that their interpretation of the Excess Policies is supported by case law. In *Uniroyal Inc.* (2005 WL 4934215, *supra*), the court, applying New York law, considered whether per-occurrence limits of liability applied on an annual basis. The court held that, where an excess liability policy contained unambiguous language providing that only aggregate, rather than per-occurrence coverage, would be annualized, any reference to contradictory terms in the underlying policies to which the excess policy followed form, in addition to the consideration of extrinsic evidence, was error (*id.*).

However, the reasoning of that case is not applicable because the underlying policies at issue there contained contradictory terms as to annualization of per-occurrence limits of liability, whereas here, the Excess Policies are silent as to annualization, and the Underlying Policies explicitly provide for it.

Additionally, although the court stated that courts generally will not read annualized limits into multi-year policies where the language of the policy does not support such an interpretation (*id.* at 16), for the reasons discussed above, the language of the policies at issue here clearly supports the interpretation that the parties intended the Underlying Policies, which explicitly provide for annualization of aggregate limits of liability, to be incorporated into the Excess Policies.

Defendants' reliance on *Diamond Shamrock Chems. Corp. v Aetna Cas. & Sur. Co.*, (609 A2d 440, 468-69 [NJ Super], cert denied 634 A2d 528 [Sup Ct NJ 1992]), is also misplaced. There, applying New York law, the court considered whether per-occurrence limits in excess liability policies covered the entire three-year policy period or whether they should be annualized, where the primary policy expressly provided that aggregate limits of liability applied on an annual basis. The excess policies did not contain any condition as to the applicable aggregate limits of liability. Additionally, the limits of liability of the excess policies did not follow form to the primary policy. Rather, the term "occurrence" was defined specifically in reference to the three-year policy period. In the absence of a follow form clause to the primary policy's annualized aggregate limits of liability, and based upon the excess policies' definition of occurrence which specifically referred to the three-year policy period, the court found that the language of the policies did not support the interpretation that the parties intended aggregate limits of liability to be annualized (*id.*).

*Maryland Cas. Co. v W.R. Grace & Co.* (1996 WL 169326 [SDNY 1996]), is also inapposite. There, several multi-year policies were issued pursuant to a quota share arrangement, and followed form to an underlying excess policy (*id.* at \*3). The follow form clause explicitly stated that the excess policies incorporated the underlying policies "except for limits of liability" (*id.*). Additionally, neither the multi-year, nor the underlying policies

contained the term "annual" to describe how limits of liability were to be applied. For these reasons, the court determined there was no basis to deviate from the unambiguous policy language, which did not provide for annualization (*id.* at \*4).

Here, however, the Excess Policies follow form and incorporate the terms, definitions and conditions of the Underlying Policies, including limits of liability. The follow form clauses only exclude terms, definitions and conditions which contradict the declarations pages of the Excess Policy, based on the "subject to" language. Therefore, because the Underlying Policies expressly provide for annualized aggregate limits of liability, based upon the follow form clauses contained therein, the aggregate limits of liability of the Excess Policies apply on an annual basis.

Because UCC has demonstrated that the Excess Policies provide for annualized aggregate limits of liability for each consecutive twelve months of the policy period, it is entitled to a declaration to that effect, and its motion for partial summary judgment is granted. Defendants' motions and cross-motion for partial summary judgment are denied.

Finally, LMC's and AMICO's motions to permit James A. Pinderski, Esq. and Daneen Fitzpatrick Berres, Esq. to be admitted pro hac vice and appear before this court as their counsel is granted without opposition, upon their submission of certificates of good standing from the jurisdiction where they are admitted (22 NYCRR § 500.4).

Accordingly, it is

ORDERED that the motion (022) by defendant Continental Casualty Company and Appalachian Insurance Company for partial summary judgment is denied; and it is further

ORDERED that the motion (023) by defendant Lumbermans Mutual Casualty Company for partial summary judgment is denied; and it is further

ORDERED that the motion (024) by defendant American Re-Insurance Company for partial summary judgment is denied; and it is further

ORDERED that the motion (025) by defendant American Home Assurance Company for partial summary judgment is denied; and it is further

ORDERED that the motion (027) by American Motorists Insurance Company for partial summary judgment is denied; and it is further

ORDERED that the cross-motion (028) by defendant Argonaut Insurance Company for partial summary judgment is denied; and it is further

ORDERED that the motion (029) by defendant St. Paul Fire and Marine Insurance Company for partial summary judgment is denied; and it is further

ORDERED that the motion (030) by Lumbermans Mutual Casualty Company and American Motorists Insurance Company to permit James A. Pinderski, Esq. to be admitted pro hac vice and appear before this court as their counsel is granted; and it is further

ORDERED that the motion (031) by Lumbermans Mutual Casualty Company and American Motorists Insurance Company to permit Daneen Fitzpatrick Berres, Esq. to be admitted pro hac vice and appear before this court as their counsel is granted; and it is further

ORDERED that the motion (026) by plaintiff Union Carbide Corporation for partial summary judgment is granted; and it is further

ORDERED and ADJUDGED that the Excess Policies provide for annualized aggregate limits of liability.

Dated: April 12, 2007

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J.S.C.

**Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.**