QBE Ams., Inc. v Ace Am. Ins. Co.
2020 NY Slip Op 31678(U)
May 28, 2020
Supreme Court, New York County
Docket Number: 653442/2013
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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INDEX NO. 653442/2013

MOTION DATE ________

MOTION SEQ. NO. 012 013 014

QBE AMERICAS, INC.,QBE FINANCIAL INSTITUTION RISK SERVICES, INC.,D/B/A QBE , QBE FIRST INSURANCE AGENCY, INC.,QBE HOLDINGS, INC.,QBE INSURANCE CORPORATION, QBE SPECIALTY INSURANCE COMPANY, NEWPORT MANAGEMENT CORPORATION, SEATTLE SPECIALTY INSURANCE SERVICES, INC.,

Plaintiffs,

- v -

ACE AMERICAN INSURANCE COMPANY, AXIS INSURANCE COMPANY, CATLIN SPECIALTY INSURANCE COMPANY, CHARTIS SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, DARWIN SELECT INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

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DECISION & ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 012) 528, 529, 530, 531, 532, 533, 535, 545

were read on this motion for JUDGMENT – SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 520, 521, 522, 523, 524, 525, 526, 527, 534, 544

were read on this motion for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 536, 537, 538, 539, 541, 546

were read on this motion for JUDGMENT – SUMMARY.

Motion sequence numbers 012, 013, and 014 are consolidated for disposition.

On remand and pursuant to the Appellate Division's mandate, the remaining parties – plaintiffs (collectively, QBE), defendants Chartis Specialty Insurance Company (Chartis), Illinois National Insurance Company (Illinois) and Lexington Insurance

Company (Lexington) (collectively, the AIG Defendants), and Zurich American Insurance Company (Zurich; collectively with the AIG Defendants, the Remaining Defendants) – each move for summary judgment. The motions are granted in part.

Background & Procedural History

In this case, QBE seeks insurance coverage from the Remaining Defendants for reimbursement of defense and settlements costs incurred in litigation concerning QBE's lender placed insurance (LPI). LPI is obtained by mortgage lenders when borrowers fail to maintain sufficient homeowner's insurance. In more than 50 civil actions and five government investigations, QBE was alleged to have charged excessive premiums and engaged in misconduct related to LPI. As a defense to coverage, among other things, the Remaining Defendants claim that the subject policies' Fee Arrangement Exclusion (FAE) applies to all of the civil actions and government investigations and therefore precludes coverage.

QBE commenced this action in October 2013 and, in February 2014, it moved for partial summary judgment seeking payment of its defense costs. As relevant to the Remaining Defendants, by order dated August 27, 2014, the motion was denied without prejudice as to the AIG Defendants (Dkt. 205 [the 2014 Decision]). After the completion of discovery and the filing of the note of issue, in November 2016, the parties moved for summary judgment. By order dated September 18, 2017, the court granted summary judgment in favor of the Remaining Defendants, finding that the FAE applied to all of the civil actions and government investigations in which QBE was named as a defendant or

was investigated and that the policies did not provide coverage for actions where QBE was not named as a defendant (Dkt. 496 [the 2017 Decision]).[1]

On September 20, 2018, the Appellate Division affirmed the 2014 Decision and modified the 2017 Decision "to deny defendants' motions except with respect to (seven civil actions – *American Residential Equities*, *Bainum*, *Gallagher*, *Robertson*, *Turnbull*, *Ulbrich*, and *Turner* – and the Missouri investigation) to declare that defendants have no obligation to pay defense costs or losses in these matters, and otherwise affirmed" the 2017 Decision (164 AD3d 1136 [1st Dept 2018] [the AD Decision]).

The parties dispute the degree to which the Appellate Division either endorsed or rejected certain holdings in the 2017 Decision. It is therefore necessary to carefully examine the AD Decision before delving into the issues raised in these motions.

The Appellate Division began by stating:

> We agree with plaintiffs that the motion court construed the (FAE) too broadly. The motion court found the exclusion applicable because the underlying actions "all concern [plaintiffs'] problematic compensation system," and because "the propriety of [plaintiffs' lender-placed] insurance business was at issue." But the relevant question is not whether the

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[1] Capitalized terms not defined here have the same meaning as in the 2017 Decision. Familiarity with the DFS Consent Order and the pertinent policy terms is assumed (*see id.* at 4-7, 10; *see also* Dkt. 384 [joint statement of undisputed facts]). The subject policies are discussed beginning on page 2 of the joint statement. In short, at issue now are ICPL primary policies issued by Chartis and Illinois and follow-form first and second layer excess policies issued respectively by Zurich and Lexington. While this case also involved a different set of duty-to-defend policies issued by Darwin and others, Darwin's settlement with QBE resolved the claims under those policies. The court also assumes familiarity with the history of how QBE acquired the various involved entities (*see* Dkt. 537 at 10 n 6 ["In June 2011, QBE acquired from Bank of America Corporation ("BOA") the book of LPI business administered by BOA subsidiary Balboa Insurance Company ("Balboa") and Newport Management Corporation ("NMC")"]). Citations to the underlying actions have the same meaning as in the joint statement (*see, e.g.*, Dkt. 384 at 28 [*Cannon II* refers to *Cannon v Wells Fargo Bank, N.A.*, which was filed in the District of Columbia and removed to federal court, and *Cannon III* refers to the same captioned lawsuit filed in Maryland]).

> underlying actions "concern" plaintiffs' compensation system generally, or whether they place plaintiffs' insurance business "at issue." Rather, the (FAE) ***applies only to claims alleging, or arising out of allegations***, that plaintiffs were connected with the prohibited conduct specifically identified in the exclusion (i.e., an agreement between an insurance carrier and broker/agent involving payment of increased fees or commissions based on volume, profitability or type of business) (164 AD3d at 1137 [emphasis added]).

The Appellate Division then explained that

> In order to determine whether there is coverage for each of the underlying actions, ***it is necessary to examine the complaints in the lawsuits as well as the documents related to the government investigations***. . . . [We] remand the matter for the motion court, after input from counsel, ***to conduct a detailed analysis of the allegations contained in the underlying actions*** to determine whether coverage is barred under the (FAE) (*id.* at 1137-38 [emphasis added]).

The Appellate Division did not end its analysis there. It expressly affirmed certain of the court's determinations, some of which explicitly rejected certain of QBE's arguments as to the meaning of the FAE.

QBE improperly seeks to relitigate one of these important holdings – that the FAE only applies to cases akin to the so-called "Spitzer" litigation and that it does not apply to agreements among QBE affiliates (*see* Dkt. 537 at 8). To understand the Appellate Division's disposition of this issue, it is essential to compare the holding and rationale in the 2017 Decision with what the Appellate Division stated about that holding.

This court initially explained:

> There is no merit to QBE's contention that because it was both the program manager/managing general agent and the broker, the payment of commissions from one QBE subsidiary to another excuses its alleged malfeasance and precludes application of the (FAE). To be sure, QBE contends, and the Carriers do not meaningfully dispute, that the genesis of the (FAE) is the "Spitzer cases". That fact, however, is not dispositive. The

> (FAE) clearly concerns all compensation between a broker and a carrier. There is no basis to conclude that QBE is off the hook because the broker and carrier were QBE affiliates. The (FAE) draws no such distinction. If anything, QBE has it backwards, as the incentive to game the system by inflating premiums to maximize commissions is exacerbated when the malfeasance can be accomplished with intracompany transactions. Moreover, while the Spitzer cases may have been the impetus for the (FAE), the (FAE) is not, as it could have been, drafted so narrowly as to only cover the exact conduct in the Spitzer cases. . . .
>
> If the (FAE) was meant to carve out affiliated brokers and carriers, it would have said so. It does not. On the contrary, the (FAE) purports to cover "any" compensation agreement between the broker and the carrier. By insisting that compensation paid between affiliated brokers and carries is not covered by the (FAE), QBE is proffering a limitation on the exclusion that has no basis in policy and is at odds with its plain meaning (2017 Decision at 18-19 [citations omitted]).

The Appellate Division agreed (*see* 164 AD3d at 1138 ["Plaintiffs contend that the (FAE) should be limited to agreements between insurance carriers and independent insurance agents and brokers. However, the exclusion does not say that"]).[2] The narrow scope of the FAE that QBE continues to proffer is therefore rejected.

The Appellate Division went on to narrow the case in other respects, holding that: (1) the Missouri investigation is not covered because "it merely sought information from plaintiffs"; (2) *Turner* is not covered "because that complaint did not allege any 'Wrongful Act' of any insured; it made no specific allegations against (QBE)"; and (3) *American Residential Equities, Bainum, Gallagher, Robertson, Turnbull*, and *Ulbrich* are not covered

[2] Aside from the issues on which the Appellate Division expressly reversed, it stated that the 2017 Decision was "otherwise affirmed" (*see id.* at 1136). Thus, the interpretation of the FAE in the above-quoted portion of 2017 Decision, which does not conflict with any other portion of the Appellate Division's decision, is law of the case that binds this court (*see Glaze Teriyaki, LLC v MacArthur Props. I, LLC*, 155 AD3d 427, 430 [1st Dept 2017]).

"because the only arguable Insured named therein is (Balboa) and plaintiffs admitted that QBE Holdings, Inc. never owned (directly or indirectly) more than 50% of the stock of (Balboa)" (*see id.* at 1138-39). The Appellate Division also affirmed the holding that QBE's "costs to respond to subpoenas in actions in which they were not sued do not constitute covered Defense Costs" (*id.* at 1139).

Without addressing the FAE's applicability, the Appellate Division expressly rejected certain of Zurich's contentions (*see id.* at 1139 ["*Tinsley* involved a Claim against an Insured. (NMC) is an Insured, and a written demand for monetary relief is a Claim. The defendant in *Tinsley* made a written demand for indemnification to (NMC). To the extent Zurich argues that *Burrhus*, *Christie*, and *Fitzgibbon* did not involve allegations of Wrongful Acts, we reject this argument"]).

Finally, the Appellate Division noted that because the 2017 Decision "decided the [prior summary judgment] motions (aside from the issue of the subpoenas) based on the [FAE] and did not reach the parties' other arguments," as indicated earlier, the Appellate Division directed "that, upon remand, the court should consider those arguments" (*id.*).

In accordance with the Appellate Division's mandate, the court directed submission of supplemental new briefs analyzing the applicability of the FAE to each of the underlying actions and investigations that were not decided by the Appellate Division along with resubmission of the prior summary judgment record so the court could consider the "other arguments" not reached in the 2017 Decision (*see* Dkt. 514).

On April 1, 2019, Zurich and the AIG Defendants separately moved for summary judgment, arguing, based on citation to each of the underlying civil actions and government

investigations, that the FAE precludes coverage. On April 22, 2019, QBE opposed and moved for summary judgment in like manner. The court reserved on the motions after oral argument (Dkt. 551 [7/11/19 Tr.]).

Discussion

Application of the FAE

The parties dispute the degree to which the Appellate Division resolved how specifically the pleadings in the underlying civil actions must allege conduct within the scope of the FAE. "The (FAE) states that

> the Insurer shall not be liable to make any payment for loss and/or defense costs in connection with any claim made against any Insured ***alleging, arising out of, based upon or attributable*** to any ***allegations*** that any Insured . . . was a participant or connected in any way in the use of an agreement or other arrangement between an insurance broker or insurance agent and an insurance carrier ***involving the payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier*** (AD Decision, 164 AD3d at 1137 [emphasis added]).

While the first above-bolded portion of the FAE seems to indicate that the claim could either allege ***or*** arise out of ***or*** be based upon ***or*** be attributable to the delineated prohibited conduct, these permutations are all tethered "to any allegations." The Appellate Division held that the 2017 Decision's application of the FAE was too broad because the FAE does not merely require the underlying action to "concern (QBE's) problematic compensation system" simply because "the propriety of (QBE's LPI) business was at issue" (*see id.*). "Rather, the (FAE) applies only to claims *alleging*, or arising out of *allegations*, that plaintiffs were connected with the prohibited conduct specifically identified in the exclusion" (*id.*). Thus, the Appellate Division held that "to determine whether there is

coverage for each of the underlying actions, it is necessary ***to examine the complaints in the lawsuits as well as the documents related to the government investigations***" (*id.* at 1137-38 [emphasis added]). Regardless of what the parties argue now, the Appellate Division made the scope of the inquiry clear: there must be actual allegations tying plaintiffs to the prohibited conduct for the exclusion to apply.

Against that backdrop, the vast majority of the underlying matters clearly allege conduct prohibited by the FAE; thus, the exclusion applies to them. Based on the Appellate Division's holding and a thorough examination of the pleadings and investigation documents, there are five cases for which the FAE does not exclude coverage. As to those limited cases, the court may ultimately have to consider whether other exclusions potentially apply.

FAE Allegations in the Underlying Actions

The underlying civil actions "alleged that, pursuant to exclusive arrangements between QBE and its Lender clients, QBE provided Lenders with overpriced master LPI policies and improperly passed along to borrowers the cost of performing mortgage-related professional services, disguised as LPI policy premiums" (Dkt. 537 at 10). "Certain plaintiffs also alleged that QBE paid Lenders or their affiliates a 'kickback' disguised as a commission, given that Lenders outsourced all their LPI business to QBE's (managing general agents). Many Civil Actions also made other LPI-related claims, such as improper backdating of LPI policies; duplicative or excess coverage placements; and/or mismanagement of borrowers' escrow funds" (*id.* at 11). The parties dispute how to

characterize the specific allegations in each action and whether they fall within the ambit of the FAE.

Of the 53 underlying civil actions,[3] the Appellate Division held that there is no coverage for seven of them. The court, therefore, begins by analyzing the pleadings in the remaining 46 civil actions to see if they contain allegations triggering the FAE.

To begin, *Riese* and *Tigbao* clearly fall within the scope of the FAE because their complaints allege that QBE "paid a 'contingent commission ***based on the profitability*** of QBE Insurance Corporation' and that "QBE First had a similar commission arrangement with other LPI Insurers with which it did business" (Dkt. 527 at 13 [emphasis added], quoting Dkt. 437 at 1146 ¶ 30, 1184 ¶ 31).[4]

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[3] While the parties itemized 50 civil actions in their joint statement (*see* Dkt. 384 at 45), in reality, there appear to have been 53 actions since there were three *Cannon* cases and two *Lane* cases (*see id.* at 27-28, 31). The court does not address the 10 cases where QBE was served with third-party subpoenas (*see id.* at 45-49) because the Appellate Division affirmed the 2017 Decision's holding that no coverage is available for them. *Tinsley*, while listed under the "Third-party civil actions" section (*see id.* at 45, 47-48), involved a request by the defendant (OneWest) for contractual indemnification from QBE, which QBE refused (*see id.* at 48). Unlike the cases involving third-party subpoenas, the Appellate Division expressly held that *Tinsley* involved a Claim against an Insured (*see* 164 AD3d at 1139). Thus, to see if the Claim in *Tinsley* arises out of or relates to conduct delineated in the FAE, the *Tinsley* pleadings must be assessed just like all of the other pleadings in the civil action. The same was initially true of *Gorsuch* (*see* Dkt. 438 at 1066), though it is listed among the 50 civil actions (*see* Dkt. 384 at 39) because an amended pleading in that case eventually named QBE as a defendant (*compare* Dkt. 438 at 1069, *with id.* at 1221). The Remaining Defendants argue that since OneWest demanded indemnification for *Tinsley* and *Gorsuch* in the same letter, "QBE's liability to OneWest arises from the kickback scheme and, for the same reasons described in *Gorsuch*, is barred from coverage under the FAE" (Dkt. 545 at 10 n 4). The court disagrees. As discussed, the FAE does not apply to *Tinsley* because its complaint lacks any allegations concerning QBE's scheme. By contrast, the FAE applies to *Gorsuch* because its amended complaint implicates QBE.

[4] As agreed, the court is relying on and citing to the exhibits from the prior summary judgment motions. For an explanation of how these voluminous exhibits may be located on NYSCEF, *see* the 2017 Decision at 4 n 6. In short, Dkts. 436-439 contain the pleadings in the underlying actions; a citation, for instance, to *Riese* referencing Dkt. 437 at 1146 ¶ 30 means that on page 1146 of the

Other cases involving Bank of America (BOA) made similar allegations and, in fact, some actually cite and rely on the Consent Order's allegations.[5] *Gustafson* "alleged that (Banc of America Insurance Services, Inc. [BAISI])[6] was an insurance broker for BOA, whose 'true purpose was to provide a conduit for the receipt of kickbacks, commissions,

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pdf accessible at Dkt. 437, the relevant allegation may be found in paragraph 30 of the *Riese* complaint. For the avoidance of doubt, the court reviewed the thousands of pages of pleadings in the underlying actions. The citations to certain paragraphs of each complaint are simply exemplars, and not an exhaustive list of each and every mention of an allegation implicating the FAE. These examples are indicative of the conduct alleged in these complaints. Based on its review of the entirety of all of the complaints, the court rejects QBE's suggestion that the civil actions principally concern unrelated bad acts outside the scope of the FAE. To be sure, as discussed in more detail herein, the court is not simply assuming that the cases "all concern [QBE's] problematic compensation system" because "the propriety of [QBE's LPI] business was at issue." Rather, the court has confirmed that in each of the cases cited herein, the plaintiffs in those cases did, in fact, allege that QBE engaged in conduct prohibited by the FAE.

[5] QBE avers that the "Insurers impermissibly rely on documents outside the complaints (such internal allocation agreements between QBE and QBE First), or bootstrap allegations in other complaints (namely the NYDFS), in order to incorporate allegations that are simply not there" (Dkt. 537 at 9). But there is nothing impermissible about this. For instance, the complaints that cite and reply on the Consent Order trigger the FAE because those complaints' allegations are "based upon" the Consent Order's allegations that QBE engaged in conduct prohibited by the FAE. Thus, even if those complaints lack sufficient independent allegations triggering the FAE (and to be sure, they do indeed contain those requisite allegations), that their allegations concerning QBE's LPI commissions are based on the Consent Order is sufficient to trigger the FAE. QBE's argument that the FAE does not apply to the DFS investigation is clearly belied by the Consent Order's express reference to corruptly inflated LPI premiums and its prohibition on QBE paying "contingent commissions based on underwriting profitability" (*see* 2017 Decision at 7).

[6] The court agrees that "QBE overreaches by arguing that allegations that contingent commission were paid to BAISI do not fall within the scope of the FAE because 'BAISI was not actually acting as insurance broker or agent'" (Dkt. 545 at 18). As the AIG Defendants correctly explain:

> The plain language of the FAE is clear: it excludes certain arrangements "between an insurance broker or insurance agent and an insurance carrier"—it does not require that the agent or broker was in fact "acting as an insurance broker or agent." Thus, QBE's admission that BAISI is "BOA's insurance agent affiliate" is an admission that the required relationship exists in the complaints in which BAISI is alleged to have received a commission. And, as the Brokerage Agreement proves, the commissions paid to BAISI included contingent commission (*id.*).

rebates, earnouts and other consideration to BOA derived from the premiums paid by Plaintiffs' for LPI"; "that after BOA sold its LPI business to QBE, it agreed QBE would be its exclusive LPI provider"; that "(a)s a kicker to the deal, QBE and BOA entered into a separate agreement guaranteeing BOA a profit share payment based on the volume of insurance premium derived by the Balboa book"; and that "(t)he net result of these exclusive deals…is that if LPI is force-placed, BOA earns both a profit share and an 'earn out'", meaning that "the system was rigged by the participants to keep the premiums high" (Dkt. 527 at 14, quoting Dkt. 436 at 631 ¶ 94, 636 ¶ 114, 637 ¶¶ 116-20). *Faili* made similar allegations (*see* Dkt. 438 at 913-14 ¶¶ 10-11, 928-29 ¶¶ 73-76). So too did *Wise* (*see* Dkt. 439 at 608 ¶¶ 14-15, 609 ¶ 18-19), *Novell* (*see id.* at 54 ¶¶ 10-11, 55 ¶ 13, 56 ¶ 15, 59-60 ¶ 27, 65 ¶ 53), *Vitek* (*see* Dkt. 437 at 1620 ¶ 12, 1628 ¶ 39), and *Holmes* (*see id.* at 928-29 ¶¶ 116-17).

Likewise, allegations involving contingent commissions paid to QBE First or BAISI based on volume or profitability were made in cases involving other banks such as Wells Fargo and are alleged to have occurred as part of kickback and quid pro quo schemes.[7]

[7] QBE continues to argue that many of the complaints focus more on wrongdoing by the banks than by QBE. But as explained in the 2017 Decision:

> QBE correctly notes that an issue in some of the civil actions was the lack of a direct duty owed by QBE to the homeowners because QBE was acting as the bank's agent in force placing the insurance. Nonetheless, the lack of a direct duty between the homeowners and QBE is not dispositive of the (FAE's) applicability. The civil actions accuse QBE of aiding and abetting the banks' breach of the fiduciary duties owed to the homeowners and conspiracy (i.e., with the banks) to defraud homeowners by giving into to the "troubling" incentives described in the Consent Order by placing unjustifiably expensive policies to reap higher commissions (2017 Decision at 12-13).

These cases include *Williams* (*see* Dkt. 436 at 44 ¶ 7, 47 ¶ 23, 48 ¶ 26), *McKenzie* (*see id.* at 785 ¶ 15, 815-17 ¶¶ 121-24), *Cannon II* (*see id.* at 1297 ¶ 27), *Cannon III* (*see id.* at 1177-78 ¶¶ 66-67),[8] *Rothstein* (*see* Dkt. 437 at 89-90 ¶ 11, 103-04 ¶¶ 70-71), *Hall* (*see id.* at 414 ¶¶ 167-68), *Totura* (*see id.* at 758 ¶¶ 44-45), *Lane I* (*see id.* at 788 ¶¶ 44-46, 792 ¶¶ 61-63), *Lane II* (*see id.* at 817 ¶ 24), *Vidrine* (*see id.* at 857 ¶¶29-31, 858-59 ¶¶ 37-39), *Singleton* (*see id.* at 1113 ¶ 7, 1117 ¶ 28), *Leghorn* (*see id.* at 1393 ¶ 4, 1407 ¶¶ 69-70), *Fladell* (*see id.* at 1928 ¶ 4, 1939 ¶ 42), *Hamilton* (*see* Dkt. 438 at 53 ¶ 3, 80 ¶ 117), *Decambaliza* (*see id.* at 394-95 ¶¶ 40-43), *Smith* (*see id.* at 448 ¶ 10), *Doyle* (*see id.* at 752 ¶ 40, 754 ¶ 46), *Carden* (*see id.* at 786-87 ¶¶ 17, 23), *Butler* (*see id.* at 965 ¶ 19, 986 ¶ 100, 989 ¶ 106), *Murphy* (*see id.* at 1020-21 ¶¶ 57-59), *Gorsuch* (*see id.* at 1232 ¶¶ 46-48, 1239 ¶ 74), *Gianakos* (*see id.* at 1246 ¶¶ 6-7), *Janiec* (*see id.* at 1269 ¶ 13), *Berene* (*see id.* at 1298 ¶ 20), *King* (*see* Dkt. 439 at 75 ¶¶18-19), *Bloom* (*see id.* at 92-93 ¶¶ 5-6, 103-04 ¶¶ 41-46), *Haddock* (*see id.* at 510-11 ¶¶ 28-29), *Derderian* (*see id.* at 584 ¶ 28, 589 ¶¶ 48-51), *Nungester* (*see id.* at 628-29 ¶ 5, 647 ¶ 85), *Feder* (*see id.* at 698-99 ¶¶ 18, 26), *Moore*

As the court explained, paragraph 2 of the FAE applies to these sorts of allegations because it covers allegations arising out of QBE "intentionally or negligently permit[ting], or aid[ing] and abet[ting] others in using, [being] aware of others using, or [being a] participant or connected in any way' with an agreement among QBE and the lender banks 'involving the payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier.'" (*id.* at 13). To be sure, "the bad acts listed in the second paragraph of the (FAE) are merely examples of the type of prohibited conduct described in the (FAE's) first paragraph", providing "a non-exhaustive list of examples of conduct prohibited by the first paragraph" (*id.* at 16). A review of complaints in the underlying actions reveals that QBE, in fact, was alleged to have engaged in acts prohibited by the first paragraph.

[8] The parties agree that coverage is not available (or indeed necessary) for *Cannon I* because it was dismissed before QBE had been named as a defendant or served (Dkt. 503 at 24; *see* Dkt. 384 at 28). Thus, whether its allegations implicate the FAE is immaterial.

(*see id.* at 789 ¶ 15), *Paz* (*see id.* at 804 ¶ 36), *Dudzinski* (*see id.* at 813 ¶ 3, 818-19 ¶¶ 27-32), and *Parker* (*see id.* at 932 ¶ 5).[9]

Addressing the complaints in these cases, QBE argues that "they contain no references whatsoever to contingent commissions" (Dkt. 537 at 17). While this may well be true of certain paragraphs QBE cited, QBE often selectively ignores allegations contained elsewhere. For example, if one only looks to paragraphs 30-35 of the *Berene* complaint cited by QBE, one might agree that none of the alleged wrongdoing is coved by the FAE (*see* Dkt. 438 at 1300-02). But reading the entirety of the complaint compels the opposite conclusion (*see id.* at 1298 ¶ 20 ["Because quid-pro-quo arrangements were common in the industry at the relevant time, Borrowers allege ***that Lexington paid a kick back or provided other consideration to Balboa in order to be permitted to participate in its lucrative force-placed flood insurance activities***"] [emphasis added]). Paying-to-play using proceeds of increased premiums is exactly what the FAE covers. It is unsurprising, therefore, that rather than responding to the paragraph actually cited by the Remaining Defendants (*see* Dkt. 533 at 28), QBE instead cites to more innocuous allegations as supposed proof that the action did not implicate the FAE.[10]

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[9] While the AIG Defendants argue that all of these cases are covered by the FAE, Zurich concedes that *Berene*, *Burrhus*, *Christie*, *DeGutis* and *Tinsley* are not excluded (*see* Dkt. 544 at 12 n 4) and that *King*, *Lane I*, *Gorsuch*, and *York* "fall on the outer edges of the FAE" (*see id.* at 11). While Zurich is bound by these admissions, the AIG Defendants are not (*see* Dkt. 545 at 7 n 2, 14 [noting that the AIG Defendants do not agree with Zurich's concessions]). The court disagrees regarding some of these cases based on the arguments proffered by the AIG Defendants.

[10] The AIG Defendants also note that "QBE mischaracterizes (the AIG Defendants') brief, and claims that they rely on the UPAs for *Nungester*, *Parker*, *Rothstein* and *Smith*" when those cases "all incorporate the findings the of the NYDFS investigation" (Dkt. 545 at 16). Complaints that incorporate the DFS allegations arise from allegations within the scope of the FAE.

Indeed, in many of the complaints, such in *Dudzinski*, the plaintiff alleged that "(t)o maintain their exclusive relationships with [] lenders and loan servicers, the insurers pay unearned 'kickbacks' of a percentage of the force-placed insurance premiums ultimately charged to the borrower, offer them subsidized administrative services, and/or enter into lucrative captive reinsurance deals with them" (Dkt. 439 at 813 ¶ 3). In other words, QBE allegedly schemed to charge excessive premiums and used that excess to induce lenders and servicers to provide them with certain types of business. These allegations track the FAE since QBE is alleged to have been a "participant … in the use of an agreement … involving the payment of increased fees, commissions or other compensation based on the volume, profitability or ***type of business referred to the insurance carrier***."

Indeed, even in those complaints where "kickbacks" are not alleged, their description of a quid pro quo fits the bill. *Paz* is instructive. In paragraph 36 of the *Paz* complaint, it is alleged that:

> Cognizant of the "high volume low margin" nature of mortgage loan servicing … QBE FIRST exploited the conflict of interest between Servicer and FNMA ***by entering into a quid pro quo arrangement*** whereby QBE FIRST agreed to perform loan tracking, escrow management, and other servicing functions on Servicers behalf and for a fee that was less than the cost of providing the servicing related services. This reduced Servicer's operating expenses, but did not decrease the amount it charged FNMA for servicing Borrower's loan. In exchange, ***QBE FIRST was rewarded with the exclusive right to provide lucrative force-placed insurance on the loans with Servicer's portfolio***. QBE FIRST selected its affiliates for Borrower's force-placed flood insurance ***and was rewarded with a "commission" equal to half the entire premium***. As noted above, this premium was many multiples of the cost insurance readily available through arms length transactions (Dkt. 439 at 804 [emphasis added]).

This is exactly the type of "payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier" contemplated by the FAE. While we now know the full extent of this arrangement (based on the UPAs and other discovery that was provided after the pleadings were filed), that such detail is not pleaded in *Paz* or many of the other cases does not mean that allegations concerning such arrangements do not qualify as an allegation of conduct prohibited by the FAE. On the contrary, the fact that a quid pro quo is alleged whereby lines of business were horse-traded with LPI for a cut of the commissions places the alleged conduct squarely within the scope of the FAE. While the Appellate Division foreclosed the possibility of relying on the UPAs in lieu of sufficient allegations, the Appellate Division did not hold that the failure to plead the specific details of the QBE contacts governing the commissions is fatal. It is not. So long as the scheme alleged fits within the FAE, the failure to plead the actual contractual terms does not preclude the FAE's applicability.

The court also rejects QBE's contention that the types of kickbacks alleged in the complaints do not trigger the FAE. Of course, simply the use of the work "kickback" would not preclude coverage. Rather, the specifics of the alleged kickback scheme are determinative. Having carefully reviewed the complaints, it is clear that the alleged kickback schemes fall squarely within the FAE. For instance, even in cases such as *Doyle*, where the full scope of QBE's scheme was not known to the plaintiff, it was still alleged that the kicked-back commissions were "based upon a percentage of the cost of the premium of the force-placed insurance" (*see* Dkt. 438 at 754 ¶ 46). An allegation that commissions were set based on premiums such that the higher the premium the higher the

commission is simply another was of saying that the commission was based on profitability – precisely what the FAE excludes.[11]

In that regard, QBE argues that some of the complaints that allege certain supposedly "generic commissions" paid by QBE to lenders "were often flat or fixed percentage payments that were not contingent in any way" (Dkt. 537 at 8). QBE misses the point. As explained in the 2017 Decision:

> It is of no moment that premiums were not priced on a policy-holder specific basis, and instead priced years earlier when the master insurance policies were issued. The master policies formed the basis for the very force-placed insurance business model that gave rise to QBE's pricing incentives. The fact that such terrible incentives were baked into the model does not cleanse the price of homeowners' individual premiums (2017 Decision at 20 n 21).

In other words, QBE conspired to structure a kickback scheme where commissions would be paid based on profitability by baking in the rates at the outset and not on a policyholder-by-policyholder basis. But that does not mean the commissions for such policies were not based on profitability (*see* Dkt. 491 [5/16/17 Tr. at 20 ["THE COURT: But QBE had its own agents or brokers who were getting commissions based upon profitability, weren't they? MR. FRENCHMAN: "They were dividing up the money in part based upon profitability"]).[12] As the court observed, "(t)he claim is that QBE … was rolling all of

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[11] Of course, this is consistent with the evidence, which shows that QBE paid commissions contingent on profit to insurance agents and brokers based on the UPAs and its agreement between with BOA and BAISI.

[12] *See* Dkt. 544 at 5-6 (QBE "admitted in written testimony submitted to (DFS) that the compensation it paid QBE First was one of its principal expenses and that this compensation included both a flat commission on the written premium, as well as a contingent commission based on program profitability").

these services into the premium … (a)nd the higher the premium the higher the profit" (*id.* at 21). It makes no sense to say that an individual commission based on a policyholder-specific inflated rate would be covered by the FAE yet a conspiracy to inflate all premiums at the outset with the intent to use the inflated portion of the premium as a kickback is not covered by the FAE. Under both scenarios, QBE is intentionally overcharging homeowners to facilitate its agreements with brokers, agents, and carriers to split the spoils "of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier." It is unreasonable to assume the FAE carved out a grand conspiracy while prohibiting individual instances of malfeasance.

Likewise, the FAE does not carve out "flat, fixed or set" commissions (Dkt. 537 at 18). If the actual elements of the FAE are otherwise alleged, the nominal computation of the commission is not determinative. For instance, the allegation that kickbacks were paid in the form of profit-based commissions – the profit coming from the inflated premiums agreed upon at the outset – is not outside the scope of the FAE simply because the kickback may have been the same each time. A consistent cut of an inflated premium is still a commission based on profit if the profit is locked in at the outset, with the number of instances of kickbacks purely being a function of volume. If anything, the incentive to maximize volume is precisely why the scheme was so pernicious. Each instance was pure profit because the structure already locked it in. By contrast, without collusion, competitively priced premiums would presumably be calculated depending on the actual needs of the homeowner. To wit, without inflated premiums, it is less likely the servicers would have been motivated to be so vigilant in catching homeowners with lapsing

coverage. There also is greater incentive to backdate policies where it is known that no risk manifested during the policy period if there is an associated kickback.

Absent collusion, insurance for borrowers could have been obtained more cheaply elsewhere, sometimes simply by paying to renew the lapsing policy. The reason this was not done was due to the alleged kickback and quid pro quo schemes. Thus, allegations sounding in breach of fiduciary duty such as failure to obtain the best possible policy, while not on its own within the ambit of the FAE, may arise out of allegations implicating the FAE if facts are alleged indicating that the FAE scheme is the reason the other misfeasance occurred. The upshot is that *allegations* such as backdating may arise out of and may be attributable to the alleged commission kickback scheme.

For these reasons, QBE's suggestion that even if the court were to find that some of the lawsuits involved allegations implicating the FAE, it still should be entitled to indemnification for portions of those actions not explicitly implicated by the FAE is rejected. This argument would make sense if, for instance, QBE was alleged to have engaged in a commission kickback scheme *and* engaged in the provision of professional services in a manner giving rise to liability having *nothing* to do with the kickback scheme. QBE should not lose coverage simply because the plaintiff sued for unrelated claims in the same complaint. The Remaining Defendants do not argue to the contrary. However, the Remaining Defendants argue that all of the actions concerning QBE's LPI that contain allegations triggering the FAE constitute a Claim "arising out of, based upon or attributable to" FAE-applicable conduct and thus coverage is precluded for the entire action. The court agrees.

Claim is defined to include lawsuits in which QBE is a named defendant (*see* 2017 Decision at 21). That all of those lawsuits concern QBE's LPI is not determinative because, as the Appellate Division explained, "the relevant question is not whether the underlying actions 'concern' plaintiffs' compensation system generally, or whether they place plaintiffs' insurance business 'at issue'" (*see* 164 AD3d at 1137); rather, the focus must be on "claims *alleging*, **or arising out of *allegations***, that plaintiffs were connected with the prohibited conduct specifically identified in the exclusion" (*id.* [emphasis in bold added]). This means that even if conduct on its own is would be not precluded if such conduct was all that was pleaded, where allegations set forth that the actionable activity stems from conduct within the scope of the FAE, that too is excluded from coverage.

This describes all claims in the underlying actions that do not independently trigger the FAE where QBE's commission scheme is otherwise alleged. Since the former occurred because of the latter, and the allegations are present in the complaints or investigatory documents, coverage is entirely precluded. As the Appellate Division has explained:

> In the context of a policy exclusion, the phrase ***arising out of*** is unambiguous, and ***is interpreted broadly to mean originating from, incident to, or having connection with***. To determine the applicability of an 'arising out of' exclusion, the Court of Appeals had adopted a 'but for' test. This test is defined as follows: If the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action (*Country-Wide Ins. Co. v Excelsior Ins. Co.*, 147 AD3d 407, 409 [1st Dept 2017] [emphasis added]).

Since all of the LPI allegations have "some causal relationship" with the FAE-applicable allegations, the FAE applies to all such allegations (*Regal Constr. Corp. v National Union*

Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38 [2010]; *see XL Specialty Ins. Co. v Agoglia*, 2009 WL 1227485, at *8-9 [SDNY Apr. 30, 2009] [explaining why "arising out of" standard warrants denial of coverage for entire underlying action], *affd sub nom. Murphy v Allied World Assur. Co. (U.S.)*, 370 F Appx 193 [2d Cir 2010]). It is not as if QBE was accused in the same lawsuit of harming homeowners by overcharging them for LPI and of totally unrelated harm.

This holding is not inconsistent with the Appellate Division's decision. The Appellate Division required a predicate determination that each underlying complaint actually contained FAE-applicable allegations – findings that were absent from the 2017 Decision. The Appellate Division *did not* hold that coverage was required for non-independently-FAE-applicable allegations if they arise out of and are tethered to conduct explicitly addressed by the FAE. Because the cases contain allegations connecting plaintiffs to the conduct that the FAE excludes, faithful application of *Country-Wide* and the Court-of-Appeals precedent upon which it relies requires finding that all of the claims in the underlying actions containing FAE-applicable allegations are precluded from coverage (*see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005] [explaining policy reasons for broad interpretation of "arising out of" language]; *see also Zurich Am. Ins. Co. v ACE Am. Ins. Co.*, 165 AD3d 558, 559 [1st Dept 2018] [citing and continuing to apply *Country-Wide*]).

That said, the Remaining Defendants concede there are certain underlying civil actions whose "complaints do not ***directly*** allege that there have been contingent commission payments" (Dkt. 545 at 9 [emphasis in original]). Yet, the Remaining

Defendants aver that the FAE also applies if a complaint "seek(s) damages alleging, arising out of, based upon or attributable to any connection to the type of agreements disallowed by the FAE" (*id.*). They argue that "(t)he allegations in *Christie* and *Fitzgibbon* that QBE backdated and/or placed duplicative or unnecessary LPI arise out of QBE's contingent commission payments to insurance agents" implicate the FAE because, "(b)ut for those payments, there would be no incentive for the lenders or agents to participate in the alleged conspiracy" (*id.*).

This is a step too far. Such a theory is nothing more than a reformulation of the 2017 Decision's rationale that all allegations related to LPI commissions are covered by the FAE since we now know that such commissions, pursuant to the UPAs, were contingent on profit. The Appellate Division rejected this theory. While most of the complaints at least expressly plead some FAE-implicated conduct to which related conduct can be said to arise out of, these complaints do not. *Christie* cannot, sub silentio, latch onto allegations in *Riese*, the Consent order, or the discovery produced in this action. Doing so is incompatible with the Appellate Division's construction of the FAE.

The implication of the Appellate Division's decision is that even though there may be no doubt that QBE engaged in conduct indisputably violative of the FAE, if such conduct is not actually alleged in a complaint, mere allegations of untethered but arguably related conduct does not trigger the FAE. It does not matter that to read the pleadings and the Consent Order is to know this was a corrupt business.[13] But the FAE is not a catchall

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[13] QBE makes much of the fact that it was never held liable by a court despite paying tens of millions of dollars to resolve cases and consenting in orders to modifying its business practices.

exclusion applicable to all bad acts. Rather, as the Appellate Division has already held, it is limited to allegations related to "payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier." Allegations such as backdating policies do not on their own fall within the plain meaning of this exclusion. Thus, coverage for *Christie* and *Fitzgibbon* is not barred by the FAE.

Likewise, the barebones allegations made by pro se litigants in *Burrhus* and *York* do not allege conduct within the meaning of the FAE. The same is true of *Tinsley*. Unlike in *Gorsuch*, not only is QBE not mentioned in *Tinsley*, even OneWest is not alleged to have engaged in a scheme to obtain contingent commissions.[14]

In any event, this is irrelevant since it is the allegations and not the underlying facts that are determinative.

[14] With respect to the five civil actions for which the AIG Defendants need not provide coverage based on the FAE – *Christie*, *Fitzgibbon, Burrhus, York*, and *Tinsley* – the court notes that the amount in controversy appears to be quite low, perhaps even collectively below the retention amount. *York* was dismissed within four months (*see* Dkt. 384 at 28). *Christie* was dismissed within nine months (*see id.* at 36). *Burrhus* was dismissed in five months (*see id.* at 37). *Fitzgibbon* was settled in eight months for an undisclosed amount (*see id.* at 39). And *Tinsley* merely involved QBE denying indemnity to OneWest without even being part of the lawsuit. QBE presumably did not expend significant sums in these actions and it seems likely that the $1.5 million retention may not have been exhausted (*see* 2014 Decision at 3, 13). In contrast, the large value settlements and attorneys' fees expenditures in the other actions were specifically noted by the parties (*see, e.g., id.* at 25 [QBE contributed $6.4 million to the *Williams* settlement]). For this reason, if the Appellate Division remands for a trial only on these five matters, the parties should confer over whether attempting to settle makes more sense than proceeding to trial.

Government Investigations

The Appellate Division held that QBE is not entitled to coverage for the Missouri investigation. The court now assesses whether coverage for the other four investigations is barred by the FAE.

First, the scope of the DFS investigation and the findings set forth in the Consent Order are discussed at length in the 2017 Decision (*see id.* at 4-7). There is no question that the investigation concerned QBE's premium sharing program and that such program was based on policies' profitability. That is why the Consent Order enjoins QBE from paying "contingent commissions based on underwriting profitability" (*see id.* at 7). Notably, many of the civil actions cited above specially cite the Consent Order as a basis for their allegations concerning QBE's contingent commission program. That QBE did not admit the factual allegations in the Consent Order does not matter since, as discussed, the allegations and not the actual facts are determinative. Because some of the facts alleged in the Consent Order independently trigger the FAE and all of the others arise out of those allegations, coverage for the DFS investigation is barred by the FAE.[15]

The Minnesota investigation was also settled with a consent order (Dkt. 526). This consent order, too, makes it clear that the investigation concerned QBE's LPI business (*see id.* at 1-3 ¶¶ A1, B4), where QBE was allegedly paying commissions to affiliated servicers for "little to no insurance placement related work" (*see id.* at 4 ¶ E1). Minnesota alleged

[15] Even if coverage was available for the DFS investigation, QBE would still be precluded from seeking indemnification for the amount paid pursuant to the Consent Order (*see* 2017 Decision at 8 n 8). Coverage would be limited to defense costs.

that "QBE charged excessive premium rates in a non-competitive market that were otherwise unsupported by actuarially sound methods" (*see id.* at 6 ¶ C) and that QBE did so as part of a quid pro quo arrangement whereby it would pay "rebates to Servicers by paying commissions to their affiliated insurance producers, providing Servicers with certain services below QBE's cost, by offering to contract with Servicer-affiliated captive insurers for reinsurance, and by offering to contract with Servicer affiliated captive insurers pursuant to contracts whereby QBE would permit the insurers to participate in QBE's catastrophe or other reinsurance programs" (*see id.* at 5 ¶ A). The alleged quid pro quo involved "the payment of …commissions or other compensation based on … (the) type of business referred to the insurance carrier"; thus, coverage for the Minnesota investigation is barred by the FAE.

The two other investigations into QBE's LPI business, brought by Massachusetts and Indiana, were settled pursuant to a Regulatory Settlement Agreement dated August 1, 2017 (Dkt. 525).[16] These investigations were part of a multistate investigation that "built on the work of prior regulatory activity" by a number of other states including New York (*see id.* at 1 ¶ 1[d]). An investigation arising out of the DFS investigation, on its own, falls within the ambit of the FAE. While this settlement agreement lacks the sort of detailed allegations found in the underlying civil actions' complaints, the investigative commencement documents sent to QBE show that the scope of the investigation covered conduct barred by the FAE.

[16] The Massachusetts investigation also resulted in an Assurance of Discontinuance (Dkt. 532).

The Massachusetts Civil Investigative Demand states that the investigation covers QBE's LPI business and sought documents concerning "payments ... that QBE received from the responsive servicer relating to force-placed insurance, and the reason for the payment" including those "relating to contingent commissions" (*see* Dkt. 442 at 410). Documents also were sought concerning the relationship between such commissions and the associated costs and expected policy losses (*see id.* at 413). It is impossible to review this document and not conclude that Massachusetts, like the other states, was investigating whether QBE was sharing LPI commissions as part of the same quid pro quo scheme that was being investigated by the other states. Indeed, QBE's response to the request for disclosure of its LPI litigation disclosed some of the very civil actions that the court has found to be exempt from coverage under the FAE (*see id.* at 424). The FAE therefore precludes coverage for the Massachusetts investigation. Because the scope of Indiana's investigation was substantially similar (*see id.* at 454), the FAE applies to it too.

<u>Other Issues</u>[17]

Because the FAE does not exclude coverage in five cases--*Christie, Fitzgibbon, Burrhus, York, Tinsley, Berene and* DeGutis--other exclusions defendants raised that were not analyzed in the 2017 Decision may need to be addressed.[18] Given the narrowed scope

[17] Because the "policies do not bar coverage for any claims arising out of an agreement to pay commissions, but only those cases which allege or arise out of allegations of an agreement in which an insurance carrier pays an increased fee or commission based on profitability or volume to an insurance agent or broker," the FAE does not render coverage illusory (Dkt. 544 at 20-21). In choosing and purchasing its policies, QBE agreed to be bound by this exclusion.

[18] In assessing these issues, the court relies on the parties' prior summary judgment briefs (*see* Dkts. 547-549 [noting relevant portions of such briefs]).

of this litigation and the retention amount, among other things however, it is unclear that all of the asserted exclusions will ultimately matter.

Exclusion (t) must be addressed at this stage because if it definitively applies, it would be dispositive of the whole case. It would bar coverage for claims "arising from, based upon, attributable to, or in any way involving the underwriting, marketing or selling of any insurance policy" (*see* Dkt. 507 at 22). The exclusion, obviously, would apply to claims concerning the issuance of LPI because the underlying actions all involve the sale of insurance.[19] Yet, this exclusion was omitted from the subject policies despite appearing in the policies for prior coverage years. According to the AIG Defendants:[20]

> Prior to the policies that gave rise to this coverage litigation, [AIG] issued a primary ICPL policy to QBE, effective May 31, 2009 to May 31, 2010 ("2009 AISLIC Policy"). The base form of the 2009 AISLIC Policy — i.e., the text of the policy without the endorsements — was known as a "named peril" form because it enumerated the particular "Professional Services" that were covered. In 2010, at the request of QBE's broker, Willis, the base form of the ICPL policy was changed from the "named peril" form to a "broad form" ICPL policy.
>
> ***Some of the exclusions in the base forms were lettered differently***. Significantly, ***former Exclusion (t)*** in the 2009 AISLIC Policy, the Reinsurer

[19] A sale is an exchange of goods or services for money. That insurance was forced-placed does not mean it was not sold. It was simply sold involuntarily. After all, the homeowners paid for it. Thus, there is nothing ambiguous about Exclusion (t). For this reason, the court disregards QBE's expert's testimony to the contrary since a party may not defeat summary judgment by offering their own subjective view of a policy's unambiguous provision, the interpretation of which is an issue of law (*see Marin v Constitution Realty, LLC*, 128 AD3d 505, 509 [1st Dept 2015), *affd as mod.* 28 NY3d 666 [2017]). The exclusion, obviously, would apply to much of what QBE does. But that is why, according to AIG, it offered QBE other types of coverage, which QBE declined.

[20] The reformation counterclaim is pleaded by the AIG Defendants but not Zurich. Since Zurich merely issued a follow form policy and was not involved in the negotiations, it has no first-hand knowledge. Nonetheless, the court agrees with Zurich that, having issued a follow form policy, if Exclusion (t) is part of the AIG policies, by definition, it is part of the Zurich policies (*see* Dkt. 491 [5/16/17 Tr. at 67]).

> Exclusion, ***was re-lettered as Exclusion (l)*** in the 2010 CSIC Policy. Further, an endorsement in the 2009 AISLIC Policy entitled "***Amend Exclusion T***" was also carried forward.
>
> ***Due to a drafting error***, however, the parties inadvertently failed to re-letter the endorsement "Amend Exclusion T" to reference the correct exclusion, which moved to exclusion (l) in the 2010 CSIC Policy. Exclusion (t) in the 2009 AISLIC policy and exclusion (1) in the 2010 CSIC policy both concerned reinsurers. Exclusion (t) in the 2010 CSIC policy, however, precluded coverage of claims arising from the "underwriting, marketing or selling of any insurance policy or annuity, or any other insurance or investment product (Dkt. 507 at 22-23 [emphasis added; citations omitted]).

Employees of Willis – *QBE's broker* – that were involved with these policies admitted during their depositions that "(n)either QBE nor Willis ever requested that Exclusion (t) in the 2010, 2011 and 2012 'broad form' policies be deleted" and that "a mistake was made with respect to the Amend Exclusion T endorsement in the renewal in 2010" (*id.* at 23; *see id.* at 24 ["Q. So wasn't it a mistake to refer to it as exclusion T? It should have been referred to as "Amend Exclusion L," because that is the exclusion in the 2010 policy that pertains to reinsurer, isn't that right? A. Yes, it should have been exclusion L."] ["Q. So you informed Ms. Bergmueller that the — that there was a typo in prior years regarding "Amend Exclusion T"? A. Yep - yes"]). An underwriter also testified that it "was a mistake," an assessment with which her supervisor concurred (*see id.* at 24-25).

There also is evidence that that "parties behaved as if the underwriting, sales and marketing exclusion was in full force and effect" during the subject policy years since, "(f)or example, in 2013, Willis prepared a comparison of the ICPL and ABPL insurance programs for QBE ***and specifically noted that sales and marketing coverage was only available under the ABPL policies***" (*id.* at 25 [emphasis added] ["Bergmueller explained

the program comparison, stating 'the standard broad form ICPL form of policy contained [a] standard exclusion for underwriting, marketing and sales ... [the] basic function of the ICPL policy is to serve as coverage for bad faith claims and extra-contractual liability claims ... underwriting, marketing and selling would be activities covered under an agents E&O policy [i.e., ABPL policy].”). In fact, “Willis and AIG underwriters agreed that if coverage for marketing and sales activities had been purchased, it would require significantly higher premiums and retentions” (*id.* at 27). “The premium, however, did not significantly change between the 2009 and 2010 policies” (*id.* at 27-28). The parties eventually recognized the mistake and corrected the error in future policies (*see id.* at 28-29). The purported error, however, affects the subject policies.[21]

The AIG Defendants argue that the omission of Exclusion (t) was a mutual mistake and that the policies should be reformed to include it. If the court does so, as noted earlier, there is no question that coverage for *all* of the underlying actions – regardless of the FAE's applicability – would be precluded.

It is well settled that “mutual mistake … may furnish the basis for reforming a written agreement” (*Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). “In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement” (*id.*). “The proponent of reformation must show in no uncertain terms, not only that mistake … exists, but exactly what was really agreed upon between the parties” (*id.* at 584). “The parties' course of performance under

[21] “QBE's claims are now limited to the 2010-2011 and 2012-2013 policy periods” (2017 Decision at 9 n 10).

the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties" (*Warberg Opportunistic Trading Fund L.P. v GeoResources, Inc.*, 151 AD3d 465, 471 [1st Dept 2017]).

That said, "there is a ***heavy presumption*** that a deliberately prepared and executed written instrument manifests the true intention of the parties and a correspondingly high order of evidence is required to overcome that presumption" (*Chimart*, 66 NY2d at 574 emphasis added]). Thus, where, as here, a party seeks reformation on the ground that a scrivener's error was the product of mutual mistake, it must carry its burden of proof with "***clear and convincing evidence***" (*US Bank N.A. v Lieberman*, 98 AD3d 422, 424 [1st Dept 2012] [emphasis added]; *see Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 87 [1st Dept 2009]).

The AIG Defendants have presented compelling prima facia evidence indicating that the parties mutually erred in omitting Exclusion (t) from the subject policies. Indeed, there does not appear to be any question of fact that the AIG Defendants made a mistake. The question is whether QBE also did so.

In opposition, QBE contends it made no such mistake and supports this contention with the deposition testimony of Judd Zimmerman, a Willis broker who was involved with the 2010-2011 policy. Zimmerman claimed it was his intent to not "include the Broad Form policy's (Underwriting) Exclusion in QBE's 2010 ICPL Policy" and that his "intent was to delete the exclusion T" (*see* Dkt. 505 at 18). Zimmerman's testimony therefore creates a question of fact – especially given AIG's burden of proving its case with clear

and convincing evidence (*see Sprewell v NYP Holdings, Inc.*, 43 AD3d 16, 21 [1st Dept 2007]).

To be sure, in reply, the AIG Defendants provide a detailed explanation for why Zimmerman's testimony may not be credible:

> Zimmerman's testimony is predicated on his sheer speculation that there already was coverage for underwriting, sales and marketing in the prior 2009 AISLIC Policy, which was a narrowly drawn, named peril ICPL policy. Zimmerman's view that "underwriting, marketing and sales were included in the category of 'insurance consulting' in the 2009 AISLIC policy" is neither probative nor competent ***as he was not QBE's broker during the 2009 policy period. Zimmerman neither negotiated nor procured the 2009 AISLIC Policy, and lacks personal knowledge of the parties' intent regarding the scope of coverage under that policy***. His testimony about that policy is particularly deficient given QBE's admission that the definition of "Professional Services" in that policy does not include the words "underwriting," "marketing," or "sales," and the undisputed evidence that neither Willis nor QBE requested to include coverage for underwriting, marketing or sales in the 2010 ICPL policy renewal, or to delete Exclusion (t).
>
> …
>
> Indeed, ***every witness with personal knowledge of the policy negotiations***, including Zimmerman, admitted that "Amend Exclusion T" was mis-lettered in the 2010 CSIC Policy and should have read "Amend Exclusion L." Neither Willis nor QBE requested that coverage for underwriting, marketing and sales be included in the 2010 renewal, or that Exclusion (t) be deleted. … In addition, QBE falsely argues that the underwriters did not know whether QBE or Willis intended the underwriting exclusion to be part of the 2010 ICPL policy, or that its deletion was a mistake. ***Each Willis broker admitted at deposition that a mistake had been made in the mis-lettering of the reinsurer endorsement*** (Dkt. 502 at 15-17 [citations omitted; last bolded text in original).

The court agrees that a reasonable finder of fact could reject Zimmerman's testimony and conclude that the parties did not intend to omit Exclusion (t) from the subject policies. And since Exclusion (t) would apply to all underlying actions and government investigations,

such a finding would mean that coverage for the actions not barred by the FAE would be unavailable.

However, Zimmerman expressly testified, based on his personal involvement, to the contrary of his former colleagues. While discrediting Zimmerman's testimony would result in the reformation claim succeeding, summary judgment cannot be granted based on credibility (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *see Art Capital Grp., LLC v Rose*, 149 AD3d 447, 448 [1st Dept 2017] ["there is a conflict between Krecke's deposition and Peck's, and a credibility issue may not be resolved on a motion for summary judgment"]). Moreover, the court cannot credit the AIG Defendants' interpretation of the precise degree to which parties intended to mirror the coverage under the prior named peril policies with the newer broad form ICPL policies while also construing the record in the light most favorable to QBE, the party opposing summary judgment (*see Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]).

Consequently, summary judgment is denied on the AIG Defendants' mutual mistake counterclaim. The court, however, conditionally grants the Remaining Defendants partial summary judgment to the extent that if the court reforms the subject policies, coverage from for all underlying actions and investigations will be precluded.

The court, for now, defers ruling on the balance of the issues raised on the prior motions as they may well be academic. If need be, a supplemental decision and order will be issued at an appropriate time without the requirement of any additional briefing. [22]

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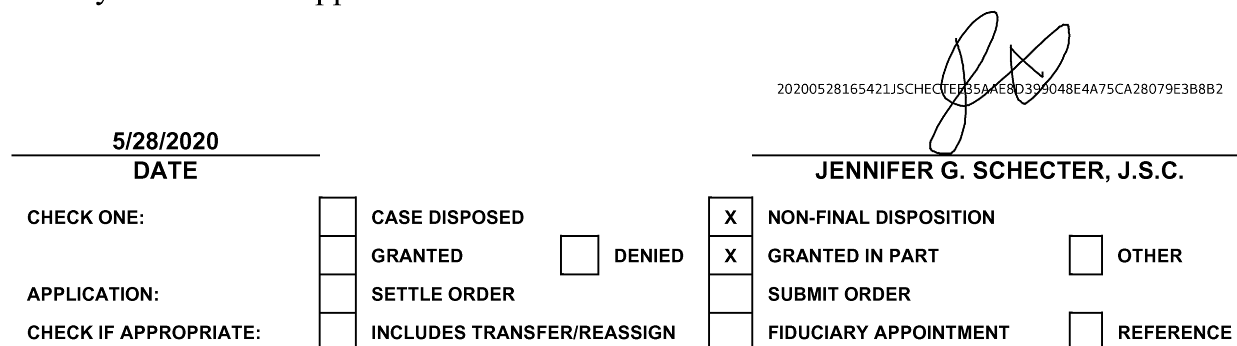
[22] Depending on how many underlying actions are potentially subject to coverage, certain issues may be moot. For example, even if *Christie*, *Fitzgibbon, Burrhus, York*, and *Tinsley* "arise out of

Accordingly, it is ORDERED that the parties' motions for summary judgment are decided to the extent that: (1) based on the FAE, the AIG Defendants need not provide coverage to QBE for all of the underlying civil actions and government investigations except *Christie*, *Fitzgibbon, Burrhus, York*, and *Tinsley*; (2) based on the FAE, Zurich need not provide coverage to QBE for all of the underlying civil actions and government investigations except *Christie*, *Fitzgibbon, Burrhus, York*, *Tinsley, Berene*, and *DeGutis*; (3) conditional summary judgment is granted to the Remaining Defendants to the extent that, if applicable to the subject policies, Exclusion (t) bars coverage for all of the underlying civil actions and government investigations; (4) summary judgment on the AIG Defendants' reformation counterclaim is denied; and (5) the balance of the motions is held in abeyance until all appeals of this decision have concluded.



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the same Wrongful Act or Related Wrongful Acts as Claims already made" in *Williams*, the aggregate coverage for those actions may still fall within the 2010-2011 policy's $15 million limit (Dkt. 507 at 42; *see* 2014 Decision at 3). Moreover, the question of whether Exclusion (j) – which prohibits indemnification for settlements where QBE returned premiums – would not appear to apply to the remaining actions, especially after accounting for the $1.5 million retention (*see* Dkt. 507 at 45). Likewise, *York* is the only remaining action where QBE is alleged to have failed to provide notice, and, in any event, the retention not being met likely moots this issue (*see id.* at 46).