At a Special Term of the Supreme Court of the State of New York held in and for the County of Oneida on May 23, 2023.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
ONEIDA COUNTY

UTICA MUTUAL INSURANCE COMPANY,

Plaintiffs,

v.

ABEILLE GENERAL INSURANCE COMPANY now known as **21ST CENTURY NATIONAL INSURANCE COMPANY; *et al.*,**

Defendants.

Index No. EFCA2018-002918

DECISION and ORDER
(Motions Nos. 16 and 17)

APPEARANCES:

Hunton Andrews Kurth LLP *by Syed S. Ahmad, Esq., and Patrick M. McDermott, Esq., for Plaintiff Utica Mutual Insurance Company*

Norton Rose Fulbright US LLP *by John F. Finnegan, Esq. for Defendants*

This combined action for breach of contract and declaratory judgment concerns a series of reinsurance contracts issued to Plaintiff Utica Mutual Insurance Company from 1977 to 1982 by the Defendants, an unincorporated association of insurance companies referred to as the Excess and Casualty Reinsurance Association ("ECRA"). Those contracts reinsure portions of umbrella policies issued by Utica Mutual to its primary liability insured, Burnham Corporation, which has been the target of more than 30,000 asbestos-related claims. Discovery is complete, and Utica Mutual and ECRA now separately move for summary judgment based upon the undisputed fact that – from 1977 to 1982 – Utica Mutual's agents left the spaces on Burnham's endorsement forms designated for the primary liability policies' annual aggregate limits blank (Motions Nos. 16 and 17). Both motions present the same issue, which the parties contend is a matter of law, namely: Did Utica Mutual and Burnham intend to place aggregate limits on the 1977 to 1982 primary liability policies?

ECRA argues that the blank spaces on the endorsement forms are unambiguous and establish that Burnham and Utica Mutual intended to set no aggregate limit for the primary policies (Motion No. 16). Utica Mutual, in turn, argues that the space designated for the aggregate limits were left blank by accident, and that the myriad of undisputed extrinsic evidence – including Burnham and Utica Mutual's decades-long course of conduct, the terms of an arms-length settlement agreement between Utica Mutual and Burnham concerning the scope of the primary policies' coverage, the uncontradicted testimony of multiple witnesses, the premiums paid by Burnham, and contemporaneous industry customs – unequivocally establishes that Burnham and Utica Mutual intended for there to be an aggregate limit of $300,000 for each of the subject primary policies (Motion No. 17). For the reasons set forth below, ECRA's motion for summary judgment is **DENIED**, and Utica Mutual's motion for summary judgment is **GRANTED,** in part.

I.

Utica Mutual is an insurance carrier based in New Hartford, New York (NYSCEF Doc. 1). Between January 1, 1953, and December 31, 1985, Utica Mutual issued 33 primary general liability insurance policies to Burnham Corporation, a commercial boiler manufacturer headquartered in Irvington, New York (NYSCEF Doc. 550). The majority of those primary liability insurance policies had express per occurrence and aggregate limits for bodily injury claims of $300,000. Around 1977, Utica Mutual modified its policy renewal processing paperwork and began using specimen form 8 E 1250 single limit endorsement (NYSCEF Docs. 549, 552). Utica Mutual's new endorsement form had two blank spaces – one for the per occurrence limit and one for the aggregate limit – and it required an agent to manually insert a value in both spaces (NYSCEF Doc. 552). However, while renewing Burnham's primary liability policies from 1977 to 1982, Utica Mutual's agents only filled in the blank space on the endorsement form for the per occurrence limit ($300,000), and left the space designated for the aggregate limit blank (NYSCEF Docs. 551-554).[1] In 1983, Utica Mutual updated and renumbered its endorsement form (from specimen 8 E 1250 to GL99170381), with the new forms including pre-printed per occurrence and aggregate limits of $300,000 (NYSCEF Doc. 566).

Utica Mutual also issued 25 umbrella policies to Burnham between August 24, 1961, and December 31, 1985, providing additional coverage, annually, in the event that the primary general liability policies were exhausted – by exceeding the retained limit on either on a per occurrence or an aggregate level – or inapplicable. The per occurrence and aggregate limits of Utica Mutual's umbrella policies ranged from $1 million (in 1963 and earlier), to $40 million (from 1980 to 1984) (NYSCEF Doc. 574). To reduce some of the potential exposure under the umbrella policies,

[1] One of the complicating issues in this action is that, although nearly 650,000 pages of documents have been disclosed, complete copies of the subject primary insurance policies were never located.

Utica Mutual reinsured portions of the assumed risk by purchasing facultative certificates from other insurance companies and cooperatives. This includes the facultative certificates that Utica Mutual purchased from the ECRA Defendants that are at issue in this action, which reinsure a percentage of the Burnham's umbrella policies from 1977 to 1982 (10% of the $5-10 million layer, 10% of the $10-20 million layer, and 20% of the $20-25 million layer) (NYSCEF Docs. 541-546).

II.

In late 1985, Burnham began to be named as a defendant in asbestos personal injury lawsuits by plaintiffs claiming exposure from its manufactured boilers, among other products (NYSCEF Doc. 571). Asbestos claims typically involve alleged exposure from dozens of potential products, often resulting in verdicts and settlements being apportioned among multiple defendants. As a result, the amount of liability a defendant faces in any single case may be less than a primary insurance policy's per occurrence limit; but the sheer volume of asbestos cases may result in the total amount of liability that a defendant experiences in any given year far exceeding its primary insurance policy's aggregate limit. Since 1985, Burnham has been named in more than 33,000 separate asbestos actions (NYSCEF Doc. 567). Utica Mutual has provided defense and indemnification coverage for all of those claims.

On August 31, 1990, five years after handling Burnham's first asbestos claim, Utica Mutual advised the ECRA Defendants that it was possible the manufacturer's primary policies' aggregate limits would be reached, and reinsurance coverage under the umbrella policies would be triggered (NYSCEF Doc. 568). Thirteen years later, in 2003, Utica Mutual began sending periodic reports and billing statements advising ECRA (and other reinsurers) that it had

either reached – or was nearing – the aggregate limits for many of Burnham's primary policies (NYSCFE Doc. 567). In doing so, Utica Mutual took the position that each of the primary policies that it had issued to Burnham, including those from 1977 to 1982, contained annual aggregate limits of $300,000. After the primary policy aggregate limit in a given year was reached, Utica Mutual started making payments on behalf of Burnham under the umbrella policy of that same year (NSYCEF Doc. 610).

By June of 2016, Utica Mutual's payments under Burnham's 1977 to 1982 umbrella policies reached the layers of those policies that the ECRA Defendants reinsured. At that point, Utica Mutual requested reimbursement from the ECRA Defendants pursuant to the facultative certificates it had purchased from them. When the ECRA Defendants refused to make those payments, Utica Mutual commenced the instant action. Utica Mutual now seeks $2,064,329.57 in reimbursement for payments that it made under umbrella policies issued from 1977 to 1982 (NYSCEF Doc. 587). The ECRA Defendants object, contending that Utica Mutual should not have made any payments under the umbrella policies because the primary insurance policies' aggregate limits were never reached. According to the ECRA Defendants, Burnham's 1977 to 1982 primary policies have no aggregate limits.

III.

"Reinsurance" is, simply put, insurance for insurance companies, whereby a carrier that has assumed risk under an insurance policy or policies (the "reinsured" or the "cedent") cedes a portion of that risk to another insurer or group of insurers (the "reinsurer") (*North River Ins. Co. v ACE Am. Reins. Co.*, 361 F3d 134, 137 [2d Cir 2004]), spreading risk throughout the insurance industry. "Facultative reinsurance" is reinsurance for a single, specific policy (as opposed to a

reinsurance treaty, which would involve a class covering many different insurance policies of a certain type) (*Global Reins. Corp. of Am. v Century Indem. Co.*, 30 NY3d 508, 513 [2017]). This action involves facultative reinsurance. In exchange for a portion of the underlying premiums, the ECRA Defendants issued facultative certificates to Utica Mutual in which they agreed to reinsure a portion of Utica Mutual's exposure under each of six umbrella policies issued to Burnham from 1977 to 1982.

Reinsurance contracts are contracts of indemnity, which means that the reinsurer is only obligated to reimburse a cedent for payments that the cedent was contractually required to make under the reinsured policy (*see e.g. Travelers Cas. & Sur. Co. v Gerling Global Reins. Corp.*, 419 F3d 181, 193 [2d Cir. 2005] [noting that it "is well established and not all surprising" that reinsurers are not required to indemnify cedents "for losses not covered by the underlying [reinsured] policies"); *Utica Mut. Ins. Co. v Abeille General Ins. Co.*, 206 AD3d 1666, 1670 [4th Dept 2022] [holding that a cedent is not entitled to reimbursement from its reinsurer for payments that it made "beyond the scope of coverage in the [underlying, reinsured] umbrella policies"]). The reinsured policies here are Burnham's 1977 to 1982 umbrella policies, and Utica Mutual would only have been contractually required to make payments under those policies if the aggregate limits in Burnham's 1977 to 1982 primary policies were exceeded.

IV.

In this action, the parties have not produced clear, legible and complete copies of the subject primary policies issued by Utica Mutual to Burnham from 1977 to 1982. However, the records from that period unequivocally demonstrate a consistent blank on the pre-printed single limit primary endorsement form where the aggregate limit was supposed to be

written in by hand. Contrary to the urging of the ECRA Defendants, those blank spaces cause the policies to be ambiguous (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]), and this proceeding hinges upon the resolution of those ambiguities. To that end, Utica Mutual argues that its agents' repeated failures in not filling in the blank spaces were administrative omissions, and that both it and Burnham had clearly and contemporaneously intended for the subject primary liability policies to include aggregate limits of $300,000 (Motion No. 17). The ECRA Defendants, in turn, zealously argue that the designated spaces on the forms were purposefully left blank because Utica Mutual and Burnham intended for the primary policies issued from 1977 to 1982 to have infinite – or, really, no – aggregate limits (Motion No. 16).

Without question, all of the extrinsic evidence presented in this action supports Utica Mutual's policy interpretation and proffered resolution of the ambiguity. Specifically, the consistent course of conduct by both Utica Mutual and Burnham has been to treat the 1977 to 1982 primary liability policies as having an aggregate limit of $300,000 (NYSCEF Docs. 574; *see Waverly Corp. v City of N.Y.*, 48 AD3d 261, 265 [1st Dept 2008] [The "best evidence of the intent of parties to a contract is their conduct after the contract is formed."]). Indeed, as a custom Utica Mutual never issued primary policies for products liability without aggregate limits (NYSCEF Docs. 621-623), nor did any other insurance company during that time (NYSCEF Docs. 632, 633; *see J.P. Morgan Inv. Mgt. Inc. v AmCash Group, LLC*, 106 AD3d 559, 560 [1st Dept 2016] [interpreting contract as a matter of law based upon "definitive extrinsic evidence of industry custom and usage"]).

Importantly, there is also no record of Burnham ever requesting that the aggregate limit for its primary liability coverage be eliminated entirely in 1977 (as the ECRA Defendants now assert), or – for that matter – be fully restored in 1983 to the pre-1977 limit. Furthermore, the consistency

of the policy premiums between the years in which the aggregate limit was expressly identified as $300,000 and the six year period when the aggregate limit was left blank demonstrates that the blanks in the forms were merely unintentional omissions, and not a substantive policy change (NYSCEF Docs. 596, 601; *see Pan American World Airways, Inc. v Aetna Casualty & Surety Co.*, 505 F2d 989 [2d Cir 1974] ["It is clear that the size of the premiums is relevant to the construction of the policy."]). Finally, Utica Mutual and Burnham entered into a settlement agreement in 2018 in which they both expressly agreed that the 1977 to 1982 primary policies had aggregate limits of $300,000 (NYSCEF Doc. 574; *Gray Manufacturing Co. v Pathe Industries, Inc.*, 33 AD2d 739 [1st Dept 1969] [holding that an indemnitor is bound as matter of law by the terms of an indemnitee's settlement, absent evidence creating a question of fact that the settlement was either unreasonable or not in good faith]).

Here, the uncontradicted extrinsic evidence before the Court establishes as matter of law that Utica Mutual and Burnham intended for there to be a $300,000 aggregate limit in the primary liability policies issued from 1977 to 1982 (*see Fairchild v Genesee Patrons Coop. Ins. Co.*, 238 AD2d 841, 842 [3d Dept 1997] [finding that uncontradicted extrinsic evidence resolved the ambiguity as a matter of law]; *see also Goulds Pumps, Inc. v Travelers Cas. & Sur. Co.*, 2016 Cal. App. Unpub. LEXIS 4674 at 51 [2d DCA 2016] [finding as a matter of law that "the aggregate limit sections in the policies from [Utica Mutual's] 1979 through 1982 [primary policies for Goulds] were left blank by mistake," and that the aggregate limit was $500,000] [*affirming* Trial Court decision on summary judgment at NYSCEF Doc. 607]; *R&Q Reinsurance Co. v Utica Mutual Ins. Co.*, 18 FSupp3d 389, 391 [SDNY 2014] [confirming arbitration decision that "the 1978-1981 policies issued by Utica to Goulds had 'aggregate limits' of $500,000 each"]; *Utica Mutual Ins. Co. v Clearwater Ins. Co.*, 2022 U.S. Dist. LEXIS 48999 [NDNY 2022]

[upholding "the prior rulings that the [1978-1981] primary policies [between Utica Mutual and Goulds] were ambiguous with respect to aggregate limits" because of the blank spaces in them, and affirming the jury verdict finding that Utica Mutual had proven those policies contained an aggregate limit]). Accordingly, Utica Mutual's cross-motion for summary judgment must be granted as to the liability of the ECRA Defendants under the 1977 to 1982 facultative certificates issued to Utica Mutual.

V.

In addition to arguing for judgment as a matter of law on the interpretation of the aggregate limit provision, the ECRA Defendants also seek, in the alternative, summary judgment dismissing Utica Mutual's claims for reimbursement under the 1977, 1978 and 1982 facultative certificates, arguing that Utica Mutual violated the warranty of retention contained in those certificates (Motion No. 16). A warranty of retention is a promise in a reinsurance contract by the cedent to maintain some of the risk in the underlying policy. Here, the facultative certificates issued by the ECRA Defendants provide that Utica Mutual "warrants to retain for its own account the amount of liability specified in Item 3," which required it to retain all of the risk except the risk ceded to the ECRA Defendants (NYSCEF Docs. 541-546). But in 1977, 1978 and 1982, Utica Mutual breached the warranty by ceding between $3 and 5 million of the first $5 million in exposure under the subject years' umbrella policies to American Re-Insurance Company (NYSCEF Doc. 563).

The ECRA Defendants argue that warranties of retention are a condition precedent to recovery under a facultative certificate, since "the greater a reinsured company's stake in the outcome of litigation, or a claim based upon the original policy, the more attentive that company will be to the investigation of the claim and minimization of the claimant's recovery"

(NYSCEF Doc. 533 *citing Fortress Re, Inc. v Jefferson Ins. Co.*, 465 FSupp 333, 339 [ED North Car. 1978]). New York Insurance Law, however, explicitly provides that a "breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract" (Insurance Law § 3106[b]). The fact that Utica Mutual ceded additional portions of its exposure under the 1977, 1978 and 1982 umbrella policies did not materially increase the risk of people contracting mesothelioma as a result of exposure to asbestos in boilers manufactured by Burnham (*Anjay Corp. v Lloyd's of London*, 33 AD3d 323, 324 [1st Dept 2006] [reversing special term and finding that a warranty violation in an insurance contract "is irrelevant when the loss is caused by an event the occurrence of which cannot possibly be affected by" the warranty violation]). As such, there is no basis to void any of the facultative certificates for a breach of warranty.

VI.

Accordingly, upon due deliberation, it is hereby

ORDERED that the Excess and Casualty Reinsurance Association/Excess and Treaty Management Corporation Defendants' motion for summary judgment pursuant to CPLR 3212 (Motion No. 16) is **DENIED**; and it is further

ORDERED that Plaintiff Utica Mutual Insurance Company's cross-motion for summary judgment pursuant to CPLR 3212 (Motion No. 17) is **GRANTED**, subject to an inquest and determination of the amount due to Plaintiff from Defendants consistent with this Decision and Order; and it is further

ORDERED that a virtual scheduling conference in this action is hereby set for Wednesday, June 14, 2023, at 2:30 p.m. via Microsoft Teams.

Dated: May 23, 2023

HON. SCOTT J. DELCONTE, J.S.C.

ENTER

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated October 27, 2022 (Motion No. 16; NYSCEF Doc. 531);

2. Affidavit of Jay Burke in Support of the ETMC Defendants' October 2022 Motion for Summary Judgment, sworn to October 25, 2022, with Exhibits 1 through 14, attached (Motion No. 16; NYSCEF Docs. 534-548);

3. Affidavit of John F. Finnegan, Esq. in Support of the ETMC Defendants' October 2022 Motion for Summary Judgment, sworn to October 25, 2022, with Exhibits 15 through 39, attached (Motion No. 16; NYSCEF Docs. 549-574);

4. Affidavit of Thomas O'Kane, sworn to October 27, 2022 (Motion No. 16; NYSCEF Doc. 646);

5. Affidavit of John F. Finnegan, Esq. in Further Support of the ETMC Defendants' October 2022 Motion for Summary Judgment and in Opposition to Utica's Cross-Motion, sworn to December 28, 2022, with Exhibits 40 through 74 attached (Motion No. 16; NYSCEF Docs. 649-684);

6. Notice of Cross-Motion, dated December 2, 2022 (Motion No. 17; NYSCEF Doc. 586);

7. Affidavit of Daniel Caswell, sworn to December 1, 2022, with Exhibits 1 through 15, attached (Motion No. 17; NYSCEF Docs. 590-605);

8. Affidavit of Patrick McDermott, Esq., sworn to December 2, 2022, with Exhibits 16 through 40, attached (Motion No. 17; NYSCEF Docs. 606-631);

9. Affidavit of Lydia B. Kam Lyew, sworn to December 1, 2022 (Motion No. 17; NYSCEF Doc. 632); and

10. Affidavit of Andrew Maneval, sworn to December 1, 2022 (Motion No. 17; NYSCEF Doc. 633).