IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACE PROPERTY & CASUALTY INSURANCE COMPANY	:	CIVIL ACTION
	:	No. 11-2838
v.	:	
	:	
GLOBAL REINSURANCE CORPORATION OF AMERICA	:	

MEMORANDUM

Juan R. Sánchez, J. **March 31, 2013**

Plaintiff ACE Property & Casualty Insurance Company, as successor in interest to Central National Insurance Company of Omaha ("CNIC"), sues Global Reinsurance Corporation of America ("Global") for breach of a facultative reinsurance certificate pursuant to which Global's predecessor, Constitution Reinsurance Corporation ("Constitution Re"), agreed to reinsure a portion of an umbrella liability insurance policy issued by CNIC. The insured under CNIC's umbrella policy incurred substantial liability for asbestos bodily injury claims, and, since 2003, CNIC has been paying a share of the insured's defense and indemnity costs pursuant to a settlement agreement with the insured and its other umbrella insurers. When CNIC's payments under the settlement exceeded $10 million, the attachment point for Global's reinsurance certificate, CNIC began billing Global under the certificate, but Global refused to pay.

Global argues it has no present obligation under the reinsurance certificate because the certificate requires CNIC to pay two separate $10 million retentions, one for the certificate's initial one-year policy period and one for its seven-month extension period, neither of which has been fully exhausted to date. Global also argues CNIC's billings are improper because they seek reimbursement for CNIC's payment of defense costs on claims for which no indemnity payment was

made, which payments Global contends are both beyond the scope of the CNIC policy Global agreed to reinsure and not reimbursable under the terms of Global's reinsurance certificate. CNIC argues Global is collaterally estopped from raising the latter two defenses because the same defenses were litigated and resolved adversely to one of Global's corporate affiliates in a June 2011 arbitration involving similarly worded reinsurance certificates Global's affiliate issued to CNIC. CNIC also disputes Global's contention the reinsurance certificate at issue is subject to two $10 million retentions.

After a nonjury trial, this Court issues the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

Beginning in 1975, CNIC issued a series of umbrella liability insurance policies to Wylain, Inc., now known as Marley-Wylain, Inc. (collectively, "Marley"). The CNIC policies were written by Cravens Dargan ("Cravens"), an underwriting manager, which also procured reinsurance on the policies. 1/31/12 Trial Tr. 30-31, 38-39.

Among the policies CNIC issued to Marley was umbrella liability policy CNU 12-48-72 (the "1976 Policy"), which was originally effective for the policy period December 31, 1976, to December 31, 1977. Ex. 5. The 1976 Policy is an "ultimate net loss" policy, providing coverage as follows:

> I. COVERAGE. The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability
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> (a) imposed upon the Insured by law, or
> (b) assumed under contract or agreement by the Named Insured and/or any officer, director, stockholder, partner or employee of the

> Named Insured, while acting in his capacity as such,
>
> for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of:
>
> (1) personal injuries, including death at any time resulting therefrom,
> (2) property damage,
> (3) advertising liability,
>
> caused by or arising out of each occurrence happening anywhere in the world.

Ex. 5 at 000224. For purposes of the 1976 Policy, "ultimate net loss" means

> the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs; premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees.

Id. An "occurrence" is

> an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period.

Id. The parties agree the 1976 Policy requires CNIC to pay defense costs as part of ultimate net loss in some instances; however, they disagree as to the scope of this obligation.

The 1976 Policy also includes several endorsements, two of which are relevant here. Endorsement No. 3 provides, in relevant part:

> IN THE EVENT OF REDUCTION OR EXHAUSTION OF THE AGGREGATE LIMITS OF LIABILITY UNDER THE UNDERLYING INSURANCES BY REASON OF PAYMENT OF CLAIMS IN RESPECT OF OCCURRENCES OCCURRING DURING THE PERIOD OF THIS POLICY, THIS POLICY, SUBJECT TO ALL THE TERMS, CONDITIONS AND DEFINITIONS HEREOF, SHALL . . . IN THE EVENT OF EXHAUSTION CONTINUE IN FORCE AS

UNDERLYING INSURANCE.

Id. at 000229. Endorsement No. 4, captioned "DEFENSE COVERAGE ENDORSEMENT," provides:

> AS RESPECTS OCCURRENCES COVERED UNDER THIS POLICY, BUT NOT COVERED UNDER THE UNDERLYING INSURANCE OR UNDER ANY OTHER COLLECTIBLE INSURANCE, THE COMPANY SHALL . . . DEFEND IN HIS NAME AND BEHALF AND SUIT AGAINST THE INSURED ALLEGING LIABILITY INSURED UNDER THE PROVISIONS OF THIS POLICY AND SEEKING DAMAGES ON ACCOUNT THEREOF; EVEN IF SUCH SUIT IS GROUNDLESS, FALSE OR FRAUDULENT . . . .

Id. at 000230.

The 1976 Policy provides $25 million in coverage per occurrence and in the aggregate, excess of $500,000 underlying insurance. The $25 million aggregate limit applies "with respect to all ultimate net loss caused by one or more occurrences, during each annual period, while this policy is in force . . . ." *Id.* at 000224. The term "annual period" means "each consecutive period of one year commencing from the inception date of this policy." *Id.* As originally written, the 1976 Policy covered one annual period, from December 31, 1976, to December 31, 1977, and therefore had one aggregate limit of $25 million.

Because Cravens was not a risk-bearing entity, before issuing the 1976 Policy, it fully reinsured the Policy through a combination of facultative and treaty reinsurance. 1/31/12 Trial Tr. 38-42; Exs. 41, 48.[1] "[R]einsurance is insurance for insurance companies." *Pac. Emp'rs Ins. Co. v. Global Reins. Corp. of Am.*, 693 F.3d 417, 421 (3d Cir.2012). Under a contract of reinsurance,

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[1] Although the reinsurance placement sheets show a "company retention" of certain portions of the 1976 Policy, *see* Ex. 41, Judith Harnadek, a Vice President of Resolute, the claim handling organization that handles the Marley claims for CNIC, explained the retention was "not really a retention because Cravens Dargan didn't retain any risk. That was then ceded to a treaty, a Cravens Dargan treaty." 1/31/12 Trial Tr. 40.

the insurer "cedes" all or part of a risk it has underwritten to another insurer, along with a portion of the premium. *See N. River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1199 (3d Cir. 1995). Facultative and treaty reinsurance are two different types of reinsurance contracts.

> Under a reinsurance treaty, the reinsurer agrees to accept an entire block of business from the reinsured. Once a treaty is written, a reinsurer is bound to accept all of the policies under the block of business, including those as yet unwritten. Because a treaty reinsurer accepts an entire block of business, it does not assess the individual risks being reinsured; rather, it evaluates the overall risk pool.
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> Facultative reinsurance entails the ceding of a particular risk or policy. Unlike a treaty reinsurer who must accept all covered business, the facultative reinsurer assesses the unique characteristics of each policy to determine whether to reinsure the risk, and at what price. Thus, a facultative reinsurer retains the faculty, or option, to accept or reject any risk.

Id. at 1199 (internal quotation marks and citations omitted).

Cravens reinsured the 1976 Policy in four layers: (1) the first $1 million of the Policy, (2) the next $4 million in excess of $1 million, (3) the next $5 million in excess of $5 million, and (4) the remaining $15 million in excess of $10 million. *See* Ex. 41; 1/31/12 Trial Tr. 39-42. Within each layer, each participating reinsurer received a premium proportionate to the share of the risk ceded to it. *See* Ex. 41; 1/31/12 Trial Tr. 40-42.

Global, through its predecessor Constitution Re, was one of the insurers that reinsured the fourth layer of the 1976 Policy, issuing facultative reinsurance certificate no. 64217 (the "Certificate" or the "Global Certificate") in which it agreed to reinsure "$2,000,000 EACH OCCURRENCE AND IN THE AGGREGATE WHERE APPLICABLE PART OF $15,000,000 WHICH IS EXCESS OF $10,000,000 WHICH IN TURN IS EXCESS OF UNDERLYING INSURANCE." Ex. 36 at 016552. In other words, Global agreed to reinsure two-fifteenths of the $15 million layer of risk after CNIC paid the first $10 million of coverage. In exchange, Global received a premium of $4,000 (less a

25% ceding commission), an amount equal to two-fifteenths of the $30,000 total premium paid to all of the reinsurers accepting a portion of the $15 million layer. Exs. 36, 41.

The Certificate is a two-page form document signed by Global underwriter Roger Hughes. Ex. 36 at 016552; Hughes Dep. 19-20. The first page of the Certificate, typically referred to as the "declarations" page, includes a number of items that must be completed by the reinsurer to provide information about the policy being reinsured, the reinsurance accepted, and the basis of the acceptance (i.e., "excess of loss," "contributing excess," and "non-concurrent"). Ex. 36 at 016552; Hughes Dep. 19-20; 1/31/12 Trial Tr. 47-48. The second page sets forth the standard "reinsuring agreements and conditions." Ex. 36 at 016553; Hughes Dep. 21 (stating Global "used the same form for everything").

The Certificate includes a "follow the form" clause, providing

> [t]he liability of the Reinsurer, as specified in Item 4 of the Declarations, shall follow that of the Company and shall be subject in all respects to all the terms and conditions of the Company's policy except when otherwise specifically provided herein or designated as non-concurrent reinsurance in the Declarations.

Ex. 36 at 016553. The Certificate was not designated "non-concurrent"[2]; therefore, pursuant to this provision, Global agreed its liability would follow CNIC's liability under the 1976 Policy, "except when otherwise specifically provided" in the Certificate itself. The Certificate also includes a "follow the settlements" clause, providing

> All loss settlements made by the Company, provided they are within the terms and conditions of the original policy(ies) and within the terms and conditions of this Certificate of Reinsurance, shall be binding on the reinsurer. Upon receipt of a definitive statement of loss, the Reinsurer shall promptly pay its proportion of such

[2] The Certificate instead reflected the reinsurance was accepted on an "excess of loss" basis, meaning the reinsurance "is participating above other insurance or reinsurance," i.e., the $10 million retention. 1/31/12 Trial Tr. 48-49.

> loss as set forth in the Declarations. In addition thereto, the Reinsurer shall pay its proportion of expenses (other than office expenses and payments to any salaried employee) incurred by the Company in the investigation and its proportion of court costs and interest on any judgment or award, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment. If there is no loss payment, the Reinsurer shall pay its proportion of such expenses only in respect of business accepted on a contributing excess basis and then only in the percentage stated in Item 4 of the Declarations in the first layer of participation.

Id.

Toward the end of 1977, CNIC issued an endorsement to the 1976 Policy that extended the Policy's expiration date by seven months, to August 1, 1978, in consideration of Marley's payment of an additional premium.[3] Ex. 5 at 000244. The endorsement does not address how the seven-month extension period should be treated for purposes of applying the 1976 Policy's $25 million aggregate limits, i.e., whether the Policy should be regarded as having a single 19-month annual period subject to a single $25 million aggregate limit or two separate annual periods of one year and seven months, respectively, each subject to a separate $25 million aggregate limit.

Before issuing the endorsement extending the 1976 Policy's expiration date, Cravens sought agreement from the Policy's reinsurers to extend their reinsurance coverage so as to ensure the Policy would continue to be fully reinsured during the seven-month extension period. *See* 1/31/12 Trial Tr. 115. As part of that effort, on September 22, 1977, Kenneth Mann, the underwriter for Cravens, sent a telex to Roger Hughes requesting Global's agreement to extend the expiration date of the Certificate "AT PRO RATA EXISTING TERMS FROM 12/31/77 TO 8/1/78 TO TRACK WITH EXPIRATION DATE OF UNDERLYING." Ex. 44; 1/31/12 Trial Tr. 103, 108-09. Mann

[3] The endorsement was apparently intended to correct a non-concurrency between the policies underlying CNIC's coverage, which had August 1 effective dates, and CNIC's policies, which had a December 31 effective date. *See* Ex. 53 at 04222.

also reported there were "NO LOSSES OVER $10,000." Ex. 44. Hughes responded by telex the following day, advising, "SUBJECT TO CONF[I]RMATION THAT AGG. COVER IS REINSTATED OF 12/31/77 WE CAN AGREE TO EXT. TO 8/1/78, IF AGG. PERIOD IS TO BE 12 PLUS 8 MOS."[4] Ex. 45.

There are no further communications between Mann and Hughes in the record; however, on October 4, 1977, Mann prepared a memo noting Cravens had "received agreement from all present reinsurers" to extend the expiration date of their certificates from December 31, 1977, to August 1, 1978, and indicating the endorsement was "to be issued on a pro rata basis with 10% additional premium across the board for all layers." Ex. 46. Cravens appears to have been authorized to proceed with the issuance of the endorsement extending the 1976 Policy shortly thereafter. *See* Ex. 123; 1/31/12 Trial Tr. 117.

On December 29, 1977, Global issued Endorsement No. 1 to the Certificate, effective December 31, 1977, which provides as follows:

> FOR AND IN CONSIDERATION OF AN ADDITIONAL PREMIUM OF [$2,745] LESS 25% CEDING COMMISSION, IT IS UNDERSTOOD AND AGREED THAT THE CERTIFICATE OF WHICH THIS ENDORSEMENT FORMS A PART OF SHALL BE EXTENDED TO EXPIRE ON AUGUST 1, 1978.
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> IT IS FURTHER UNDERSTOOD AND AGREED THAT EFFECTIVE FOR THE PERIOD OF 12/31/77 TO 08/01/78 THE UNDERLYING AGGREGATE LIMITS WHERE APPLICABLE SHALL BE UNIMPAIRED AND FOR THE PURPOSE OF THIS REINSURANCE ONLY OCCURRENCES TAKING PLACE DURING THE TERM OF 12/31/77 TO 08/01/78 SHALL BE CONSIDERED IN DETERMINING THE EXTENT OF ANY EXHAUSTION OF THE UNDERLYING AGGREGATE LIMITS.

Ex. 36 at 016550. The first paragraph of the endorsement reflects the parties' agreement to extend

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[4] In fact the requested extension was for an addition seven, rather than eight, months.

the Certificate by seven months in consideration of an additional premium. The parties disagree regarding the meaning of the second paragraph. Global asserts by specifying that the underlying aggregate limits (i.e., CNIC's $10 million retention) would be "unimpaired" effective for the Certificate's seven-month extension period, the endorsement reflects the parties' agreement that there would be a separate $10 million retention for the extension period. CNIC maintains the endorsement did not create a new underlying aggregate limit but merely confirmed that the Certificate's single $10 million retention was unimpaired as of the extension period's effective date and could be eroded only by occurrences taking place during the extension period.

In addition to the 1976 Policy, CNIC also issued other umbrella liability policies to Marley, including Policy No. CNU 03-48-63 (the 1979 Policy), which provided coverage for the period from August 1, 1979, to August 1, 1980. Ex. 8. The terms and conditions of the 1976 and 1979 Policies appear to be substantially similar. The 1979 Policy, like the 1976 Policy, was written and fully reinsured by Cravens. 1/31/12 Trial Tr. 31, 38-39. The reinsurers of the 1979 Policy included Gerling Global Reinsurance Corporation, United States Branch, the predecessor to Global Reinsurance Corporation, United States Branch ("U.S. Branch"), a Global affiliate. Ex. 37-38.[5] U.S. Branch, through its predecessor, issued two facultative reinsurance certificates (the "U.S. Branch Certificates") reinsuring a total of $2 million of the 1979 Policy. One of the U.S. Branch Certificates reinsured $1 million of the $5 million layer excess of the first $5 million of coverage, Ex. 37; the other reinsured $1 million of the $15 million layer excess of the first $10 million of coverage, Ex. 38. The U.S. Branch Certificates are similar, but not identical, to the Global Certificate at issue in

[5] Although U.S. Branch and Global are separate corporations, they both fall under the umbrella of the same German parent company, Globale Beteiligungs GmbH. Exs. 116-117.

this case. For example, the U.S. Branch Certificates contain an arbitration clause, Ex. 37 ¶ 17; Ex. 38 ¶ 17, while the Global Certificate does not. Moreover, the U.S. Branch Certificates were never extended and thus do not include an endorsement like the one included in the Global Certificate.

In April 2001, Marley notified CNIC it was the subject of asbestos bodily injury claims that might eventually impact the umbrella liability insurance policies CNIC had issued to Marley.[6] Ex. 9. In February 2002, Marley filed a declaratory judgment action against CNIC and its other excess and umbrella carriers in Indiana state court seeking a declaration regarding the insurers' obligation to indemnify Marley with respect to asbestos bodily injury claims and to pay costs incurred by Marley in defending against such claims. Ex. 11. In March 2002, CNIC notified Marley it was reserving all rights pending an investigation of Marley's claims. Ex. 12.

CNIC retained Patrick Shine, Esquire, of Cohn Baughman & Martin to represent it in the declaratory judgment action. 1/30/12 Trial Tr. 38. As part of the representation, Shine evaluated various coverage issues under CNIC's policies, including choice of law, trigger of coverage, number of occurrences, and allocation. *Id.* at 43. With respect to choice of law, CNIC was concerned about the possibility the Indiana court would find the policies were governed by Indiana law, which CNIC perceived to be generally unfavorable to insurers. *Id.* at 45, 158. CNIC was also concerned about the likelihood the Indiana court would apply "all sums" allocation, permitting the insured to select an insurance policy or policies to respond to its claims, rather than allocating the claims among all potentially responsible insurers. *Id.* at 43-44, 155-56. Although an insurer whose policies were selected for all sums allocation could theoretically seek contribution from other insurers whose

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[6] Marley had been faced with such claims for some time, for which its primary insurers were paying defense and indemnity costs pursuant to a settlement agreement, but the number of claims had more than doubled in the previous year. Ex. 9.

policies were triggered by the claims, the right to contribution was not clear under Indiana law, and pursuing contribution could be costly in any event. *Id.* at 44, 156, 160.

Shine also evaluated the scope of CNIC's obligation to pay defense costs under its policies. *Id.* 44-45. In the declaratory judgment action, Marley took the position its excess and umbrella insurers had to pay defense costs for all claims, regardless of merit. *Id.* at 46; *see also* Ex. 11 at 012959. Shine believed CNIC's policies limited its defense costs obligation to those claims that resulted in payment of indemnity. 1/30/12 Trial Tr. 46. Although Holly Hotchkiss, the claim handler initially assigned to the Marley claims, was skeptical of this potential defense, *id.* at 49-50, in December 2002 or January 2003, Shine researched the issue and drafted a memo summarizing the case law support for the proposition that CNIC's "duty to reimburse defense costs [should] be deemed 'co-extensive with its duty to indemnify' and [CNIC] [should] only have an obligation to reimburse defense costs for occurrences to which the policies apply." Ex. 21 at 013410. Shine did not find any Indiana cases on point, nor did he cite any contrary authority in his memo. Shine viewed the defense costs issue as significant because a substantial portion of the asbestos claims Marley had resolved had been dismissed without an indemnity payment. *See id.* at 013409. Under the cases cited in Shine's memo, CNIC would have no obligation to pay defense costs for such claims. *Id.*

While the argument Shine identified, if successful, had the potential to reduce CNIC's liability for defense costs, it raised other tactical concerns. Casey Johnson, an attorney who worked on asbestos and environmental claims for CNIC, was concerned taking this position (i.e., that CNIC did not have to pay defense costs unless and until an indemnity payment was made) would prevent it from exerting control over Marley's defense of the underlying claims, leaving Marley free to "roll

over" and make small indemnity payments on non-meritorious claims so as to be able to recoup its defense costs. Ex. 22; 1/30/12 Trial Tr. 52-55, 162. On Johnson's recommendation, the question of how to proceed on the defense costs issue was discussed at a weekly roundtable meeting of claim managers in February 2003. Ex. 22; 1/30/12 Trial Tr. 53-54. Organized by Resolute Senior Vice President and manager Ann Siminoff, these roundtable meetings provided a forum in which issues of interest or concern could be raised to obtain input from other managers. 1/30/12 Trial Tr. 54.

At the meeting, which Shine attended by phone, the participants discussed the concern Johnson had raised about losing the ability to exert control over the defense of the underlying claims. *Id.* at 54-55. In addition, some claim managers were also concerned that CNIC's policies themselves could be regarded as having conflicting language and could be found to be ambiguous on the issue of CNIC's defense obligation. *Id.* at 55. In particular, there was concern that endorsements to the policy could be interpreted to require CNIC to defend underlying asbestos claims in some circumstances. Shine testified there was concern that Endorsement No. 3 to the 1976 Policy, which provides the policy will "in the event of . . . exhaustion of the aggregate limits of liability under the underlying insurances . . . continue in force as underlying insurance," Ex. 5 at 000229, could be interpreted to require CNIC to "step[] in the shoes of the primary [insurer] and tak[e] over the defense," 1/30/12 Trial Tr. 128, 139-40. After looking into the issue, Shine personally did not think this provision applied to asbestos claims; however, "[t]here was concern." *Id.* at 128. Shine also testified there was concern about Endorsement No. 4, which provides that "as respects occurrences covered under this policy but not covered under the underlying insurance or under other collectible insurance, the company shall . . . defend in his name and behalf and suit against the insured alleging liability insured under the provisions of this policy and seeking damages on account thereof; even

if such suit is groundless, false or fraudulent . . . ." Ex. 5 at 000230. According to Shine, there was concern that this endorsement could be interpreted broadly or viewed as ambiguous as to whether an occurrence could be considered "not covered" where the underlying policy was exhausted. 1/30/12 Trial Tr. 140-41. It is not clear whether Shine believed this endorsement could apply to asbestos claims. *Id.* at 123-24. In addition to the concerns about the endorsements, there was concern that the assistance and cooperation clause in the policy could be interpreted to prohibit CNIC from disavowing an obligation to pay defense costs if it exercised its right to associate in the defense and control of a claim and required Marley to litigate a claim it wished to settle. *Id.* at 141-43. The claim managers were also concerned by the fact the coverage litigation was pending in Indiana, which in their view made it unlikely the defense costs issue would be resolved favorably to CNIC. *Id.* at 55.

The consensus at the meeting was that the argument for a more limited defense costs obligation could be useful to CNIC in negotiating with Marley but was not a position the claim managers were eager to put before an Indiana court. *Id.* As summarized in a May 2003 litigation budget Shine prepared, CNIC's litigation strategy was to file a summary judgment motion on the defense costs issue "to exert pressure on Marley to accept responsibility for some share of the defense and indemnity of its pending asbestos claims under a permanent funding agreement." Ex. 27 at 013357-58. Although Shine noted there was case law support outside of Indiana for a more limited defense costs obligation under the 1976 Policy, he stated his belief the trial court would "not grant [CNIC] complete relief with respect to the payment of defense costs only after coverage is determined," noting "Indiana coverage law in general is far to[o] biased toward insureds." *Id.* at 013358.

In July 2003, the court in the Marley declaratory judgment action granted summary judgment in favor of Marley on the issues of choice of law, trigger, and allocation. Ex. 28. The court held the policies were subject to Indiana law, a "continuous trigger,"[7] and "all sums" allocation. *Id.* Shine viewed the ruling as "tak[ing] away a great deal of leverage [CNIC] may have had in negotiating a permanent funding agreement." *Id.* CNIC did not thereafter file the contemplated summary judgment motion.

Ultimately, CNIC and five other umbrella insurers settled their coverage dispute with Marley by entering into an "Umbrella Insurer Settlement and Funding Agreement" (the "Settlement and Funding Agreement") in which the insurers agreed to pay defense and indemnity costs for asbestos bodily injury claims against Marley in shares to be determined according to a formula set forth in the Agreement.[8] Ex. 31. The Settlement and Funding Agreement provides for allocation of defense and indemnity costs for each covered asbestos bodily injury claim on a "pro-rata, time-on-the-risk basis," with each participating insurer's share to be determined based on the number of months of a claimant's "injury allocation period" for which the insurer provided coverage. *Id.* at 000108-10. Under the Agreement, a claimant's injury allocation period is the period from the claimant's first actual exposure to a Marley asbestos-containing product to the manifestation or diagnosis of an asbestos-related disease, the claimant's death, or a default date. *Id.* at 000107. An insurer's

[7] Under the "continuous trigger" standard, a policy is triggered if it was in effect at any time between the claimant's first exposure to asbestos-containing products and diagnosis of an asbestos-related disease. *See id.* at 014677-79.

[8] Although the parties executed the Settlement and Funding Agreement in counterparts between October 2003 and February 2004, with both CNIC and Marley signing in December 2003, the Agreement's effective date was July 1, 2003, the date Marley's primary layer of coverage was deemed to have been exhausted. Ex. 31.

contribution percentage of defense and indemnity costs for a particular claim is calculated by determining the number of months in the claimant's injury allocation period (excluding any periods of coverage attributable to insolvent insurers and/or exhausted policies); determining the number of months during the injury allocation period for which the insurer provided coverage to Marley which has not been exhausted; and dividing the insurer's number of months of coverage by the number of months in the injury allocation period. *See id.* at 000109.

The Agreement requires the participating insurers to pay indemnity costs for all judgments against Marley with respect to asbestos bodily injury claims, but requires payment of indemnity for settlements only when such settlements are authorized and meet certain criteria as to the claimant's ability to prove exposure to a Marley asbestos-containing product and injury consistent with asbestos exposure. *Id.* at 000106; *see also* 1/30/12 Tr. 62. The Agreement also requires Marley to consult with the participating insurers with respect to all significant developments in a claim, and gives the insurers input as to whether a proposed settlement is authorized for purposes of triggering the insurers' obligation to pay indemnity costs. *See* Ex. 31 at 000112-13. The Agreement requires participating insurers to pay as defense costs "all reasonable and necessary fees, costs and expenses incurred in the investigation and defense of [asbestos bodily injury claims]," *id.* at 000106, and does not limit the obligation to pay defense costs to those cases in which an indemnity payment is made.

The Settlement and Funding Agreement was accompanied by a contemporaneously executed Policy Limits Agreement specifying the umbrella policies to which the Settlement and Funding Agreement applied and listing the policy period, the "annual aggregate occurrence limits," and the "total aggregate limits" for each policy. Ex. 30; *see also* Ex. 31 at 000108 (noting Settlement and Funding Agreement applies to those policies set forth in the Policy Limits Agreement). The Policy

Limits Agreement lists the 1976 Policy as having a 19-month policy period (from December 31, 1976, to August 1, 1978), annual aggregate occurrence limits of $25 million, and total aggregate limits of $50 million, reflecting Marley's position that the 1976 Policy covers two annual periods—one for the original policy period of December 31, 1976, to December 31, 1977, and another for the extension period from December 31, 1977, to August 1, 1978. Ex. 30; *see* 1/30/12 Trial Tr. 47, 65.[9]

CNIC disagreed with Marley's position that the 1976 Policy had two $25 million aggregate limits, and Shine discussed the issue in face-to-face meetings with Marley's counsel before either party signed the Settlement and Funding Agreement or the Policy Limits Agreement.[10] 1/30/12 Trial Tr. 64. Marley's counsel agreed CNIC could reserve its rights on the issue of the 1976 Policy's total aggregate limits so long as the other insurers did not object. *Id.* After conferring with counsel for the other insurers, Shine wrote to Marley's counsel on November 21, 2003, confirming that, with no objection from the other parties, CNIC was "reserv[ing] the right to contest Marley's position that [the 1976 Policy], in effect from 12-31-76 to 8-1-78, [was] subject to more than one single annual

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[9] The Policy Limits Agreement also lists the 1979 Policy as one of the CNIC policies subject to the Settlement and Funding Agreement. Ex. 30.

[10] Although CNIC ultimately took the position the 1976 Policy had a single $25 million aggregate limit, Shine appears to have initially assumed the Policy had two aggregate limits. In a November 2002 email to Hotchkiss and Johnson, Shine referred to the one-year and seven-month policy periods covered by the 1976 Policy separately, each with $25 million limits. Ex. 140. In his May 2003 litigation budget, Shine again listed the policy periods covered by the 1976 Policy separately, each with limits of "$25 mill [occ] and agg." Ex. 27 at 013356. In "asbestos task force" (or "ATF") documents prepared after CNIC reserved its rights on this issue, CNIC continued to list the 1976 Policy as a one-year policy and a seven-month renewal, each with limits of "$25 mil occ & agg." Exs. 143-45; *see also* 1/30/12 Trial Tr. 171. Because the ATF communications are prepared for use in connection with actuarial analysis to assess the adequacy of CNIC's asbestos reserves, however, such documents are intended to reflect CNIC's maximum potential exposure rather than its most likley exposure. 1/30/12 Trial Tr. 201-02, 205.

aggregate limit." Ex. 29; 1/30/12 Trial Tr. 63-64. Two weeks later, CNIC and Marley signed the Settlement and Funding Agreement and the Policy Limits Agreement. Although CNIC's reservation of rights is not specifically referenced in either agreement, Marley has never taken the position CNIC's reservation of rights was not effective, and CNIC and Marley have not yet finally resolved the issue of whether the 1976 Policy has one or two aggregate limits. 1/30/12 Trial Tr. 66, 146, 169.[11]

Dan Brehm, Senior Vice President and Chief Claims Officer for Resolute, ultimately authorized CNIC's participation in the settlement. *Id.* at 148, 151, 161, 163-64. Brehm authorized the settlement on the recommendation of Jens Fog (the claims handler then responsible for the Marley claims), who had reviewed the agreement with Shine and other claims personnel with experience in asbestos claims,[12] all of whom believed CNIC should enter into the Settlement and Funding Agreement. Ex. 32; 1/30/12 Trial Tr. 166-68. Shine recommended that CNIC enter into the settlement because it provided protections to CNIC that would be unavailable if the issue were decided in court, including requiring proof of exposure to a Marley product for payment of indemnity and a modified pro rata allocation. 1/30/12 Trial Tr. 61. Brehm believe the settlement represented

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[11] Although Global argues CNIC's attempted reservation of rights is ineffective under the express terms of the Settlement and Funding Agreement, that issue is not for this Court to resolve at this time. Even if Global's arguments were meritorious—an issue on which this Court takes no position—the settlement documents would preclude CNIC from litigating the number of aggregate limits issue only if Marley were to raise (and prevail on) this defense. There is no indication in the current record that Marley has disputed the validity of CNIC's reservation of rights.

[12] In addition to Shine, Fog reviewed the Settlement and Funding Agreement with Jim Hucksima, an attorney and manager for asbestos and environmental claims, and Krista Glen, an attorney and claim handler who had worked in asbestos claims at another insurance company and who had a good understanding of the asbestos disease process, which Brehm viewed as helpful in determining which asbestos plaintiffs had a legitimate claim of injury. *Id.* at 167-68.

"the best course to minimize the exposure to my company and to the policies my company was handling." *Id.* at 164. Shine and Brehm both testified the settlement did not require CNIC to pay any claims that were not at least arguably covered under its policies. *Id.* at 63, 178. As Brehm explained, "everything that was compromised was compromised because there was a risk that we would lose." *Id.* at 178.

Pursuant to the Settlement and Funding Agreement, Marley retained PACE (now known as KCIC, Inc.), a third party claims administrator, to administer the asbestos bodily injury claims in accordance with the Agreement. 1/31/12 Trial Tr. 183; *see also* Ex. 31 (requiring Marley to retain and pay all costs of a third party claims administrator). PACE, on behalf of Marley, generates the monthly billing summaries submitted to the participating insurers. PACE's bills list each individual policy separately and list the indemnity costs, defense costs, and total costs charged to each policy for the month in question. *E.g.*, Ex. 81 at 017394. The bills also provide subtotals, reflecting the amount due from each insurer under all of its participating policies. *E.g.*, *id.* CNIC's 1976 Policy appears twice on each of PACE's billing summaries, once for the original policy period from January 1, 1977, to December 31, 1977 (identified as CNU-12-48-72(A)), and once for the seven-month extension period from January 1, 1978, to July 31, 1978 (identified as CNU-12-48-72(B)), with amounts due for indemnity and expense payments listed separately for each policy. *E.g.*, *id.*

In addition to generating monthly bills, PACE also prepares a monthly "policy summary by insurer," which tracks the aggregate amount of indemnity and expense costs allocated to each individual policy against the total aggregate limits of the policy. *E.g.*, *id.* at 017514. PACE's monthly policy summaries also list CNIC's 1976 Policy twice, and show each as having "total aggregates" of $25 million, *e.g.*, *id.*, consistent with Marley's position that the seven-month

extension period constitutes a separate annual period with a separate aggregate limit.

Although PACE is billing the Marley claims against two $25 million aggregate limits, pursuant to its reservation of rights, CNIC is paying the Marley claims "under a single aggregate." 1/30 12 Trial Tr. 169-70, 178. As Brehm explained, CNIC is "paying the Marley claims under the terms of the cost-share agreement and currently under a single aggregate[] because that's all we need to do. . . . Until one aggregate is breached, there's really no reason to question whether there's more than one aggregate." *Id.* at 170, 173, 178.[13]

Since entering into the Settlement and Funding Agreement, CNIC has communicated regularly with Global and U.S. Branch regarding its payments pursuant to the Agreement. In December 2004, CNIC sent Global (then known as Constitution Re) an update regarding the Marley asbestos claims. Ex. 55. CNIC provided Global with copies of the Settlement and Funding Agreement, the Policy Limits Agreement, Shine's November 2003 reservation of rights letter, and the 1976 Policy, explaining that while Marley had taken that position the 1976 Policy was "subject to more than one single annual aggregate limit, [CNIC] argue[d] that the policy has a single aggregate limit of $25 million," and noting it had "reserved its right to contest Marley's position regarding the aggregate limit issue." *Id.* at 016949. CNIC also provided Global with a breakdown of its settlement payments under each of its policies and the remaining policy limits, listing the 1976 Policy only once with a 19-month policy period and a single $25 million aggregate limit. *Id.* CNIC sent the same update letter to U.S. Branch (then known as Gerling Global Reinsurance Corp., U.S. Branch), enclosing the 1979 Policy, which U.S. Branch had reinsured, instead of the 1976 Policy.

[13] As of January 2012, Brehm's understanding was that CNIC was only "about halfway through the twenty-five million dollars of the first aggregate" after "eight or nine years" of paying claims under the settlement. *Id.* at 171.

Ex. 54. Although both letters were directed to the same person—Charlotte North, who served as the day-to-day claim handler for both Global and U.S. Branch at the time—at the same address, CNIC nevertheless communicated separately with North regarding the Global and the U.S. Branch Certificates.

By April 2009, CNIC's payments under the 1979 Policy had exceeded $5 million, the attachment point of the lower level U.S. Branch Certificate, which reinsured $1 million of the $5 million layer excess of $5 million. Ex. 57; *see also* Ex. 37. Accordingly, on April 28, 2009, CNIC billed U.S. Branch $10,205.72 under the lower layer U.S. Branch Certificate. Ex. 57. CNIC's billing included U.S. Branch's share of indemnity and defense (or "expense") costs CNIC had paid as part of ultimate net loss under the 1979 Policy. Ex. 57 at GRC00678; 1/31/12 Trial Tr. 69-70. The billing also included a small amount of declaratory judgment expense (i.e., expense CNIC incurred in its coverage litigation with Marley), which was billed to CNIC's reinsurers proportionately. Ex. 57 at GRC00678; 1/31/12 Trial Tr. 70-71. CNIC directed its billing, which also served as an update regarding CNIC's payment of asbestos claims under the CNIC policies reinsured by Global as well as by U.S. Branch, to Dennis Annechino, an Assistant Vice President of both Global and U.S. Branch, who had succeeded North as the day-to-day claim handler for both companies. Ex. 57.

On May 8, 2009, Annechino objected to the billing on various grounds, including that it did not comport with language in the U.S. Branch Certificate providing the reinsurer would pay "its proportion of expenses . . . incurred by the Company in the investigation and settlement of claims or suits provided loss payment is made by the Company affecting this Certificate, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment . . . ." Ex. 60 at 00050

(quoting ¶ 11 of U.S. Branch Certificate). Annechino also requested certain additional information from CNIC. Although Annechino objected to the billing in his capacity as Assistant Vice President of U.S. Branch, he wrote to CNIC on Global letterhead.

CNIC billed additional amounts under the lower layer U.S. Branch Certificate in December 2009 and February 2010, to which Annechino continued to object, at least in part. Exs. 65, 68, 69. Because U.S. Branch failed to pay the amounts billed by CNIC, CNIC demanded arbitration in March 2010, pursuant to the arbitration clause in the U.S. Branch Certificates. *See* Ex. 111 at 8. CNIC thereafter continued to bill the lower level U.S. Branch Certificate.

By December 2010, CNIC's payments of indemnity and defense costs under the 1976 Policy had exceeded $10 million, the attachment point of the Global Certificate. Ex. 75. On December 3, 2010, CNIC billed Global $20,039.95 under the Certificate, and also billed additional amounts under the lower layer U.S. Branch Certificate. This billing, like CNIC's earlier billings under the U.S. Branch Certificate, included Global's share of indemnity and defense costs CNIC had paid as part of ultimate net loss under the 1976 and 1979 Policies and also included a small amount of declaratory judgment expense.

On January 11, 2011, Annechino objected to the billing under the Global Certificate on the basis that it failed to comport with paragraph E of the Certificate, which provided Global would "pay its proportion of expenses . . . incurred by the Company in the investigation and its proportion of court costs and interest on any judgment or award, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment . . . ." Ex. 77 at 04153 (quoting ¶ E of Global Certificate). Although his objection pertained only to the Global Certificate and was written on Global letterhead, Annechino signed his letter in his capacity as Assistant Vice President of U.S.

Branch.

When Global refused to pay CNIC's December 2010 billing under the Global Certificate and an additional billing submitted by CNIC in March 2011, CNIC filed the instant action, which Global removed to federal court in April 2011.[14] CNIC alleges Global has breached its obligations under the Certificate by failing to pay CNIC's billings to date, and seeks declaratory relief with respect to Global's obligation to pay past, current, and future billings under the Certificate in a timely manner.

In its Answer, Global raised the affirmative defenses that CNIC was paying claims beyond the scope of the policy Global reinsured and Global therefore had "no obligation to reimburse [CNIC] for such *ex gratia* payments,"[15] and that CNIC was billing Global for expenses in a manner inconsistent with paragraph E of the Certificate. Answer, Affirmative Defenses & Countercl. ¶¶ 33-34. Global also asserted a counterclaim seeking a declaratory judgment that it has no present obligation under the Certificate because CNIC has "not properly account[ed] for the exhaustion of underlying aggregate limits." Countercl. ¶¶ 12-13.

In the meantime, CNIC and U.S. Branch proceeded with the arbitration regarding U.S. Branch's obligations under its Certificates. In its pre-hearing brief and at the June 2011 arbitration hearing, U.S. Branch, represented by the same outside counsel that represents Global in this action, raised two defenses to CNIC's billings under the U.S. Branch Certificate. First, U.S. Branch

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[14] Before initiating this action, CNIC sought Global's agreement to include the parties' dispute regarding the Global Certificate in CNIC's arbitration with U.S. Branch; however, Global declined the request. *See* CNIC's Mem. in Supp. of Mot. for Partial Summ. J. Based on Collateral Estoppel 6 & Ex. S (noting Global decisionmakers "prefer[red] to keep th[e] matters separate").

[15] "An *ex gratia* payment is one that is 'made by one who recognizes no legal obligation to pay but who makes payment to avoid greater expenses as in the case of a settlement by an insurance company to avoid costs of a suit.'" *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1346 n.10 (S.D.N.Y. 1995) (quoting *Black's Law Dictionary* 514 (5th ed. 1979)).

objected to CNIC's billings insofar as they sought reimbursement for CNIC's payment of defense costs with respect to claims that did not result in payment of indemnity (e.g., claims dismissed because the claimant could not establish injury or injury resulting from a Marley product), arguing such costs were not covered by CNIC's 1979 Policy and were therefore *ex gratia* payments U.S. Branch was not required to reimburse. *See* Ex. 111 at 9-16; Ex. 112 at 31-38. Second, U.S. Branch argued the plain language of its own Certificates limited reimbursement of defense "expenses" to those claims for which a loss payment was made, and also specified U.S. Branch would reimburse CNIC's expenses "in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment." *See* Ex. 111 at 16-25; Ex. 112 at 38-42. U.S. Branch thus asserted because CNIC's billings included amounts paid for defense costs that were outside the scope of both CNIC's 1979 Policy and U.S. Branch's Certificates, U.S. Branch was unable to determine what, if any, obligation it owed to CNIC.

U.S. Branch also presented testimony from its Vice President, Peter Morone, at the arbitration hearing. Morone oversaw Annechino's handling of CNIC's claims under both the U.S. Branch and the Global Certificates. Morone identified his title as "vice president of APH claims for form[er] Global U.S. Branch and Constitution Re companies," 2/1/12 Trial Tr. 187; however, there is no evidence he testified on behalf of Global at the arbitration hearing.

On June 3, 2011, at the conclusion of the three-day arbitration hearing, the arbitration panel issued an award in favor of CNIC. By majority vote, the arbitrators ordered U.S. Branch "to pay in full all outstanding billings under [CNIC's 1979 Policy] billed to [the lower level U.S. Branch Certificate]" and to "pay to CNIC the full amount of all future billings under [both U.S. Branch Certificates] within thirty (30) days of their receipt." Ex. 115. The arbitrators declined to award

CNIC interest on its past billings and also denied CNIC's request for attorneys' fees and costs. *Id.*

The parties thereafter proceeded with the instant case. Following a period of discovery, the parties filed a series of cross-motions for summary judgment on the various issues. After hearing oral argument, this Court reserved ruling on the motions, and the case proceeded to a four-day nonjury trial. In September 2012, the Court denied the pending dispositive motions, indicating the issues raised therein would be addressed based on the record developed at trial.

CONCLUSIONS OF LAW

Global raises three objections to CNIC's billings under the Certificate. First, Global objects that the billings include payments of defense costs on claims for which no indemnity payment has been made, which payments are clearly beyond the scope of the 1976 Policy (the "*ex gratia* defense"). Second, Global objects that the payment of such defense costs also contravenes paragraph E of the Certificate, which requires payment of defense costs (or "expenses") only on claims for which CNIC has made a "loss" (i.e., indemnity) payment (the "loss ratio defense"). Finally, Global asserts (by way of its counterclaim) that it has no present obligation to pay any amounts billed by CNIC because it agreed to provide reinsurance only after CNIC has paid $10 million under the 1976 Policy, a requirement which Global contends applies separately to the initial one-year policy period and the seven-month extension period. Global thus contends its obligations under the Certificate are not triggered until CNIC pays out $10 million in at least one of these periods.

CNIC argues the doctrine of collateral estoppel applies to preclude Global from raising its *ex gratia* and loss ratio defenses in this action because both defenses were actively litigated and resolved adversely to Global's affiliate, U.S. Branch, in its arbitration with CNIC. CNIC also contends even if collateral estoppel does not apply, Global's defenses fail on the merits. Finally,

CNIC disputes Global's contention that the Certificate is subject to two separate $10 million retentions.

Although all of the issues in this case are governed by state law, they are not governed by the same state's law. The parties agree New York law governs the preclusive effect of the CNIC-U.S. Branch arbitration award, as the arbitration took place in New York. The parties further agree Indiana law governs interpretation the 1976 Policy pursuant to the Indiana court's summary judgment ruling in the Marley declaratory judgment action.

The parties disagree as to which state's law governs interpretation of Global's Certificate; CNIC argues Pennsylvania law applies, while Global maintains the Certificate is governed by New York law. Nevertheless, the parties appear to agree this Court need not undertake a choice of law analysis because the relevant contract interpretation principles are the same in both jurisdictions. CNIC's Proposed Findings ¶¶ 204-05 & n.8; *see* Global's Proposed Findings ¶ 263 (citing New York and Pennsylvania case law regarding contract interpretation).

This Court agrees a choice of law analysis is unnecessary in this case because, as the Third Circuit Court of Appeals recently recognized, "the basic rules of [contract] interpretation[] are well established and do not differ between New York and Pennsylvania." *Pac. Emp'rs Ins. Co.*, 693 F.3d at 426, 432 (holding a choice of law analysis is unnecessary if there are no "actual, relevant differences" between the two jurisdictions' laws). Under the law of both states, the court first "must determine (as a matter of law) whether contractual language is ambiguous." *Id.* at 426. If the language of the contract is unambiguous, the court must "follow its plain meaning," *id.*, so as to "give effect to the intention of the parties as expressed in the unequivocal language employed," *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (N.Y. 1978); *see also Ins. Adjustment Bureau, Inc.*

v. Allstate Ins. Co., 905 A.2d 462, 468 (Pa. 2006) ("The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties."). The terms of a commercial contract should be interpreted as they would be understood by one "who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002); *see also Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1193 (Pa. 2001).

Where, however, a contract is ambiguous, extrinsic evidence is admissible, and resolution of the ambiguity is for the trier of fact, *Ins. Adjustment Bureau*, 905 A.2d at 468-69; *N.Y. v. Home Indem. Co.*, 66 N.Y.2d 669, 671 (N.Y. 1985). "A contract is ambiguous only if it is written so imperfectly that it is susceptible to more than one reasonable interpretation." *Pac. Emp'rs*, 693 F.3d at 426 (internal quotation marks and citation omitted). Moreover, "[t]he mere fact that the parties do not agree on the proper construction does not make a contract ambiguous." *Id.*[16]

A. Collateral Estoppel

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding

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[16] Pennsylvania and New York law may arguably differ as to whether the doctrine of *contra proferentem*, pursuant to which ambiguities in a contract are construed against the drafter, applies to contracts between insurance companies. "New York law enforces reinsurance contracts without resort to the *contra proferentem* rule that is sometimes used in the context of direct insurance." *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 342 F.3d 78, 81 (2d Cir. 2003). While Pennsylvania courts have applied the *contra proferentem* doctrine in disputes between insurance companies, *see Erie Ins. Exchange v. Transamerica Ins. Co.*, 533 A.2d 1363, 1366-67 (Pa. 1987); *Pa. Nat'l Mut. Cas. Ins. Co. v. Traveler's Ins. Co.*, 592 A.2d 51, 53 (Pa. Super. Ct. 1991), because these cases involved disputes between insurers with respect to policies issued to underlying insureds (rather than to other insurers), it is not clear whether Pennsylvania courts would also apply the doctrine in the reinsurance context. Nevertheless, even in Pennsylvania, *contra proferentem* is a doctrine of last resort, applicable only if the language of the contract is ambiguous and extrinsic evidence fails to clarify its meaning. *See Pa. Dep't of Transp. v. E-Z Parks, Inc.*, 620 A.2d 712, 718 (Pa. Commw. Ct. 1993) (citing *Burns Mfg. v. Boehm*, 356 A.2d 763, 766 n.3 (1976)).

an issue raised in a prior action or proceeding and decided against that party or those in privity."

Buechel v. Bain, 97 N.Y.2d 295, 303 (N.Y. 2001). Under New York law,

> [t]wo requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.

Id. at 303-04 (citations omitted).

Because Global was not a party to the arbitration between CNIC and U.S. Branch, the key issue as to the applicability of collateral estoppel is whether Global was in privity with U.S. Branch with respect to the arbitration.[17] In the context of collateral estoppel,

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[17] Global also contends the *ex gratia* and loss ratio defenses raised by U.S. Branch cannot be regarded as having been "necessarily decided" in the arbitration because the arbitration panel provided no reasoning for its ultimate decision and rejected significant portions of CNIC's requested relief. This argument lacks merit. U.S. Branch's defenses asserted CNIC's billings were improper because CNIC had paid and was seeking reimbursement for amounts not covered by the 1979 Policy or the U.S. Branch Certificates. Because both defenses were predicated on the notion CNIC's billings included amounts for which there was no coverage, had the arbitrators accepted either argument, they necessarily would not have ordered U.S. Branch to pay the full amount of CNIC's billings. Yet this is exactly what the arbitration award did, directing U.S. Branch "to pay in full all outstanding billings under CNIC policy 03-48-63, billed to [U.S. Branch] Certificate No. 73-30924," and to pay "the full amount of all future billings under Certificate Nos. 73-30924 and 73-30925." Ex. 115. The decision to award CNIC the full amount of its billings is inconsistent with, and thus necessarily reflects a majority of the arbitrators' rejection of, U.S. Branch's *ex gratia* and loss ratio defenses. Although the arbitrators declined to award CNIC certain additional relief it had requested, including interest and attorneys' fees and costs, *id.*, such relief was not implicated by U.S. Branch's *ex gratia* and loss ratio defenses, and the failure to grant such relief does not suggest any rejection of those defenses.

Global also argues its defenses are not identical to the defenses raised by U.S. Branch because of differences in the certificates at issue in the arbitration and in this case. As to the *ex gratia* defense, which concerns the proper interpretation of language in CNIC's policy, Morone agreed the issue was the same under the Global and U.S. Branch Certificates, and Global does not

> privity is an amorphous concept not easy of application * * * and includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action. In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate.

Buechel, 97 N.Y.2d at 304 (internal quotation marks and citations omitted).

CNIC argues Global and U.S. Branch are in privity with respect to the defenses litigated in the arbitration because U.S. Branch fully and fairly represented Global's interests with respect to those defenses. CNIC emphasizes the companies have functioned as a "single, indistinguishable entity" with respect to CNIC's reinsurance claims, noting the same two individuals—Annechino and Morone—have reviewed and analyzed CNIC's claims on behalf of both companies and the same litigation counsel has represented both companies in their disputes with CNIC, raising the same defenses at least in part through the testimony of the same witness (Morone).

Although the issue is an extremely close one, mindful that "[d]oubts should be resolved against imposing preclusion," *id.*, this Court finds Global and U.S. Branch are not in privity in the circumstances presented here. Privity based on representation exists where "the interests of the person alleged to be in privity were 'represented [in the prior proceeding] by another vested with the authority of representation.'" *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 185 (2d Cir. 2003) (quotation

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seriously contend otherwise. While Global does point to differences in the relevant certificate language regarding the loss ratio defense, because the Court finds Global was not in privity with U.S. Branch with respect to the arbitration, the Court need not resolve whether the differences identified by Global are material.

omitted).[18] Such authority exists where, for example, "a party to a previous suit was, at the time of the litigation, acting as either a fiduciary or organizational agent of the person against whom preclusion is asserted," *Stichting*, 327 F.3d at 185, or where the parties share another similar relationship, *see Green v. Santa Fe Indus.*, 70 N.Y.2d 244, 253 (1987) (recognizing privity based on representation may exist between an insured and its liability insurer based on the parties' indemnitor-indemnitee relationship, and between a bankruptcy trustee and a creditor whose interests the trustee represented in a prior action).

Here, however, there is no evidence U.S. Branch was vested with authority to represent Global's interests in the arbitration between U.S. Branch and CNIC. As an initial matter, the arbitration concerned CNIC's billings under reinsurance certificates issued by U.S. Branch's predecessor with respect to CNIC's 1979 Policy. Global's Certificate, pursuant to which Global's predecessor agreed to reinsure a portion of an earlier CNIC policy, was not at issue in the arbitration.[19] Indeed, when CNIC sought Global's agreement to "add the Constitution Re certificate into this [arbitration] proceeding," Global declined to do so. CNIC's Mem. in Supp. of Mot. for

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[18] Although the collateral estoppel issue in *Stichting* concerned the preclusive effect of a federal criminal conviction and was therefore governed by federal law, *id.* at 184-86, federal law "uses privity in a way similar to its use under New York law," *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995); *see also Hallinan v. Republic Bank & Tr. Co.*, 519 F. Supp. 2d 340, 348 n.9, 356-58 (S.D.N.Y. 2007) (rejecting the argument that the concept of privity is broader under New York law than under federal law), *aff'd*, 306 F. App'x 626 (3d Cir. 2009).

[19] This case is thus distinguishable from *Buechel v. Bain*, in which the New York Court of Appeals held three former law partners were in privity for purposes of litigating the validity of fee arrangements to which they were all parties and from which their right to receive payments derived. *See* 97 N.Y.2d at 304-05. Here, in contrast, CNIC's claims against Global and U.S. Branch arise under different reinsurance certificates issued by different predecessor corporations which reinsure different (albeit substantially similar) CNIC policies. CNIC has not cited any cases finding corporate affiliates to be in privity with respect to liabilities arising out of separate but similarly worded contracts with a common third party.

Partial Summ. J. Based on Collateral Estoppel Ex. S. Global's refusal to include its certificate in the arbitration suggests U.S. Branch was *not* authorized to represent Global's interests in that proceeding.

Nor is the close functional relationship between the two entities a sufficient basis on which to conclude that U.S. Branch represented Global's interests in the arbitration. *Usina Costa Pinto S.A. Acucar e Alcool v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170, 1176 (S.D.N.Y. 1996) ("Independent corporate affiliation, by itself, does not create a master/servant or principal agent relationship."). Although part of the same corporate family, Global and U.S. Branch are separate entities which do not appear to have a parent-subsidiary relationship. While the companies share the same officers and claim handling personnel, the decisionmakers with respect to CNIC's claims (Annechino and Morone) held equivalent positions with both companies and thus were authorized to act on behalf of Global with respect to CNIC's claims under the Global Certificate and on behalf of U.S. Branch with respect CNIC's claims under the U.S. Branch Certificates. CNIC notes Annechino was lax in observing corporate formalities in his communications with CNIC about its claims, responding to CNIC's billings on Global letterhead but including his title as Assistant Vice President of U.S. Branch, regardless of the certificate to which the billing pertained. Annechino's sloppiness, however, does not suggest Global and U.S. Branch were functionally the same. Significantly, Annechino appears to have responded separately to CNIC's billings under the Global and U.S. Branch Certificates based on the language of the particular certificate at issue. *Compare* Exs. 60 & 68 (responding to CNIC's billings to lower level U.S. Branch Certificate), *with* Ex. 77 (responding to CNIC's billing as to Global Certificate).

While New York courts have in some instances relied on parties' corporate affiliations,

overlapping officers, and shared counsel to support a finding of privity, those cases also involve significant additional indicia of privity not present in this case. In *Melwani v. Jain*, No. 02-1224, 2004 WL 1900356 (S.D.N.Y. Aug. 24, 2004), for example, the district court held two "sister companies" were in privity with respect to a plaintiff's successive business tort actions against them. The plaintiff had initially sued one corporation (RSPI) for improper registration of a website, false advertising, tortious interference with prospective business relations, and unfair competition. After the action against RSPI was settled and dismissed, the plaintiff asserted the same claims against RSPI's corporate affiliate (DI), and the court dismissed the action based on res judicata. In finding DI was in privity with RSPI with respect to the earlier action, the court noted the two companies were sister companies which had the same executive officers and litigation counsel. *Id.* at *2. Significantly, however, the court also noted DI's interest in the case was "virtually identical" to RSPI's interest in the prior litigation because the plaintiff sought to hold DI liable for RSPI's conduct based on its alleged domination and control of RSPI. *Id.* at *2-3 (noting under the plaintiff's theory, DI's liability was "entirely derivative of RSPI's liability"). The court also observed DI had "financed the prior federal action for RSPI, was the party to be notified in case of a default, and paid the settlement amount that resolved that action," demonstrating DI's control of RSPI's defense in the earlier litigation. *Id.*

In *Ruiz v. Commissioner of Department of Transportation*, 858 F.2d 898, 903 (2d Cir. 1988), the court noted the fact that two separate groups of plaintiffs challenging the validity of summonses issued to them under the same city vehicle weight regulation program were represented by the same counsel in their successive state and federal lawsuits was of "singular significance" to the court's privity analysis. However, the plaintiffs in the later-filed federal court action were not only

represented by the same attorney as the plaintiffs in the earlier-filed state court action, but had by stipulation authorized their attorney and the state court plaintiffs to include their federal constitutional claims in the state court action and thus to represent their interests with respect to those claims. *Id.*; *see also Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277-78 (N.Y. 1970) (finding parties' retention of the same counsel to be "of singular significance" to the question of privity between widow's estate and her heirs in successive actions regarding the ownership of a bank account jointly owned by the widow and her deceased husband, where counsel had been retained in both actions by one of the estate's executors who was the husband of one of the heirs and whose relationship with the law firm was such that he had "practical control of all proceedings").

Unlike in the foregoing cases, there is no evidence Global controlled U.S. Branch's defense of the arbitration because there is no evidence that the relevant U.S. Branch decisionmakers were acting on behalf of Global in the arbitration. This Court agrees with the analysis of *Hartford Accident & Indemnity Co. v. Columbia Casualty Co.*, 98 F. Supp. 2d 251 (D. Conn. 2000), in which the district court held a reinsurer was not collaterally estopped from litigating its coverage defenses based on an arbitration decision rejecting similar defenses asserted by the reinsurer's parent corporation with respect to facultative reinsurance certificates the parent corporation issued to the same reinsured. In *Hartford*, as in this case, two affiliated reinsurance companies had issued similar certificates to the same reinsured for different policy periods. Although the reinsurers were separate legal entities, the reinsured's claims under both sets of certificates were managed by the same claim handling personnel, and, when the claims resulted in litigation, the reinsurers retained the same legal counsel to represent them and agreed to coordinate discovery between the two proceedings. (The claims against the parent company proceeded to arbitration pursuant to the arbitration clause in its

certificates; however, the subsidiary's certificates did not include an arbitration clause.)

In holding the arbitration decision against the parent company did not foreclose the subsidiary from litigating its coverage defenses, the court found the two companies were not in privity with respect to the arbitration. The court rejected the argument that the similarity between the parties' certificates was sufficient to demonstrate they shared the same legal interest, noting "[p]rivity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts." *Id.* at 256 (quotation omitted). The court also rejected the reinsured's contention that the close functional relationship between the parties as corporate relatives and their reliance on the same claim handling personnel and outside counsel were sufficient to establish privity between the parties. While acknowledging such factors were relevant to the privity analysis, the court found these considerations were not dispositive given that the subsidiary, a separate legal entity, was not a party to the arbitration and the arbitration panel had not considered its certificates. *Id.* at 256-57. The court also remarked its decision to decline to apply collateral estoppel "comport[ed] with the reality that [the subsidiary] never agreed to submit its contractual disputes with [its reinsured] to arbitration," remarking the reinsured "should not be permitted to achieve a result through the back door that it would not have been able to achieve through the front door, particularly where it is clear that the parties had no understanding that either this litigation or the arbitration would affect the other proceeding." *Id.* at 257.

These considerations apply with equal force here. Therefore, for the reasons set forth above, the Court finds Global and U.S. Branch are not in privity with respect to the U.S. Branch arbitration, and the Court will proceed to address Global's *ex gratia* and loss ratio defenses on their merits.

B. *Ex Gratia*

For its *ex gratia* defense, Global argues that pursuant to its settlement with Marley, CNIC is paying defense costs that are clearly beyond the scope of the 1976 Policy. According to Global, while the Policy requires CNIC to pay defense costs on only those claims that result in liability being imposed on Marley (by judgment or settlement) for personal injury arising out of an occurrence, in the Settlement and Funding Agreement, CNIC agreed to pay defense costs for all claims asserted against Marley, regardless of whether the claim resulted in payment of indemnity. CNIC does not dispute it is paying defense costs on claims for which no indemnity payment was made. Rather, CNIC asserts it is making such payments pursuant to a good faith settlement of arguably covered claims, which settlement Global is obligated to follow.

The parties agree this defense implicates the "follow the fortunes" doctrine, which "prevent[s] reinsurers from second guessing good-faith settlements and obtaining de novo review of judgments of the reinsured's liability to its insured." *N. River*, 52 F.3d at 1199; *see also Travelers Cas. & Sur. Co. v. Ins. Co. of N. Am.*, 609 F.3d 143, 149 (3d Cir. 2010) (noting the doctrine "significantly restricts a reinsurer's ability to challenge the coverage decisions that led to its liability to the insurer").[20] Under the follow the fortunes doctrine, "when an insurer loses—or settles—an underlying coverage dispute," the insurer's payments to its insured are generally binding on the reinsurer. *N. River*, 52 F.3d at 1205. The follow the fortunes doctrine "insulates a reinsured's liability determinations from challenge by a reinsurer unless they are . . . in bad faith, or the payments are clearly beyond the scope of the original policy." *Travelers*, 609 F.3d at 149 (quotation

[20] Global refers to the "follow the fortunes" doctrine, while CNIC refers to the "follow the settlements" doctrine. The follow the settlements doctrine has been characterized as "the follow-the-fortunes doctrine in the settlement context." *Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp. of Am.*, 419 F.3d 181, 186 n.4 (2d Cir. 2005). Therefore, for ease of reference, the Court will refer only to the follow the fortunes doctrine.

omitted). Thus, a reinsurer seeking to avoid making payments pursuant to a settlement by its reinsured "must show either that the coverage decisions that led to the reinsurer's liability to the insurer were made in bad faith, or that the coverage provided clearly fell outside the scope of the policies the reinsurer agreed to reinsure." *Id.*; *see also N. River*, 52 F.3d at 1207 (holding the "'follow the fortunes' doctrine requires a court to find reinsurance coverage unless the reinsurer demonstrates the liability to the insured was the result of fraud and collusion or not reasonably within the scope of the original policy").[21]

Global does not contend CNIC's decision to enter into the Settlement and Funding Agreement was the product of bad faith. Thus, to avoid reimbursing CNIC for its payments pursuant to the settlement, Global must show CNIC's payment of defense costs on claims for which no indemnity payment is made is not even arguably within the scope of CNIC's policy. *See Commercial Union Ins. Co. v. Swiss Reins. Am. Corp.*, 413 F.3d 121, 127 (1st Cir. 2005). Because the follow the fortunes doctrine requires a reinsurer to indemnify for payments "reasonably within the terms of the original policy, even if technically not covered by it," *Christiania Gen. Ins. Corp. of N.Y. v. Great Am. Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992), Global cannot meet its burden by showing its interpretation of the relevant policy language is the most reasonable or persuasive, *Travelers*, 609 F.3d at 165. Rather, Global must show "that the underlying policy language 'as a matter of [Indiana] law, unambiguously provides that the polic[y]'" does not pay defense costs for

[21] The follow the fortunes doctrine serves the long-established goals of maximum coverage and settlement. *See N. River*, 52 F.3d at 1206. As the Third Circuit Court of Appeals recently explained, "[i]f the [insurer] knew that its settlement decisions could be challenged by every reinsurer, there would be little incentive to settle with the insured. The costs and risks of litigation avoided by settling with the insured would only be revived at the reinsurance stage." *Travelers*, 609 F.3d at 149 (quotation omitted).

claims on which no indemnity payment is made. *N. River*, 52 F.3d at 1207; *see also Travelers*, 609 F.3d at 165.

Global argues the language of the 1976 Policy unequivocally provides that CNIC is not required to pay defense costs unless and until a claim results in payment of indemnity.[22] Global argues this limitation is apparent from the following Policy provisions. First, the Policy imposes only a duty to "indemnify" Marley and specifically provides CNIC "shall not be called upon to assume charge of the settlement of any claim." Second, the Policy provides the duty to indemnify arises only when liability has been imposed upon Marley by law or when Marley has assumed liability under a contract (e.g., a settlement), and further provides CNIC shall not be liable with respect to an occurrence under the Policy "unless and until [Marley or its underlying insurer] shall have paid the amount of the underlying limits on account of such occurrence." Third, the Policy provides the liability for which CNIC must indemnify Marley must be liability "for damages" on account of "personal injuries" (including bodily injury) "arising out of [an] occurrence." In other words, Marley must incur liability for a claimant's bodily injury resulting from an occurrence to trigger CNIC's duty to indemnify Marley. Finally, the Policy requires CNIC to indemnify Marley for "ultimate net loss," or amounts Marley becomes obligated to pay "by reason of personal injury . . . as a consequence of any occurrence covered hereunder." CNIC argues these provisions

[22] Although Global must establish the challenged defense costs are clearly beyond the scope of the Policy as a matter of Indiana law, Global does not cite any applicable Indiana law. Under Indiana law, "[i]nsurance contracts are governed by the same rules of construction as any other contracts. Clear and unambiguous policy language is given its ordinary meaning . . . to determine the intent of the parties at the time the contract was made as disclosed by the language used to express their rights and duties." *Holiday Hospitality Franchising, Inc. v. Amco Ins. Co.*, 983 N.E.2d 574, 577-78 (Ind. 2013) (internal quotation marks and citations omitted). Where contractual language is ambiguous, however, such ambiguities are generally resolved in favor of the insured, unless "such an interpretation fails to harmonize the provisions of the contract as a whole." *Id.* at 578

unambiguously establish that CNIC has no obligation to reimburse Marley's defense costs until Marley becomes liable to pay the underlying claim.

CNIC does not specifically contest Global's interpretation of any of the policy provisions described above. Indeed, Shine, who advanced a similar argument in the coverage issue memo he prepared in December 2002 or January 2003, essentially agreed that Global's interpretation was the most plausible interpretation of those provisions. *See* 1/30/12 Trial Tr. 115-19. Rather, CNIC argues the 1976 Policy as a whole included provisions, such as Endorsements No. 3 and 4 and the "assistance and cooperation" clause, that CNIC reasonably believed could have been found by an Indiana court to be ambiguous and that could have been interpreted to require coverage for defense costs even on claims for which no indemnity payment was made. The fact the case was pending in Indiana, a jurisdiction "not viewed by the insurance industry as a good jurisdiction in which to raise coverage issues," *id.* at 158, heightened CNIC's concerns that the defense costs issue would not be resolved in its favor.

To the extent that Global disagrees with CNIC's assessment that an Indiana court could have viewed the 1976 Policy as ambiguous with respect to CNIC's defense costs obligation, it must show that, as a matter of Indiana law, the provisions identified by CNIC are not ambiguous and clearly would not require CNIC to pay defense costs on a claim unless an indemnity payment was also made. *See Travelers*, 609 F.3d at 165; *N. River*, 52 F.3d at 1210. Global's only argument with respect to the ambiguities identified by CNIC is that Shine apparently did not believe the relevant endorsements applied to asbestos claims, from which Global infers the endorsements could not have

played a meaningful role in CNIC's analysis of its exposure under the 1976 Policy.[23] Although it is true that Shine does not appear to have believed at least Endorsement No. 3 applied to asbestos claims (for reasons not explained at trial), *see* 1/30/12 Trial Tr. 128, both endorsements were a source of concern for claim managers at CNIC, at least some of whom were attorneys, *see id.* at 128, 139-41. Moreover, Shine was concerned that the Policy's "assistance and cooperation" clause could be interpreted to preclude CNIC from disavowing a defense costs obligation if it exercised its right to assert control over Marley's defense of underlying claims. *Id.* at 142-43. These concerns, along with the more general concern that Indiana was an unfavorable forum in which to raise coverage issues, led CNIC to conclude its chances of prevailing on the defense costs issue in Indiana were "pretty slim." *Id.* at 55.

While CNIC may have had a strong legal argument, with some case law support from other jurisdictions, that the language of the 1976 Policy did not require CNIC to pay defense costs on a claim unless and until Marley became liable to pay indemnity on the claim, CNIC believed there were ambiguities in the Policy that could cause this issue to be resolved unfavorably to it. Because Global has not shown the relevant provisions were, in fact, unambiguous and clearly would not require CNIC to pay defense costs in the absence of an indemnity payment under Indiana law, Global has not met its burden to show CNIC's payment of such costs is not even arguably covered by the Policy. *See Travelers*, 609 F.3d at 168 (observing "where the policy language is ambiguous with respect to the issue in dispute, a reinsurer can only meet its burden under the follow-the-fortunes doctrine by pointing to a controlling decision definitively resolving the ambiguity in its favor").

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[23] Global also disputes CNIC's contention that Indiana courts are generally favorable to policyholders and argues this justification is legally insufficient to support CNIC's settlement decision with respect to defense costs in any event.

Accordingly, the Court finds Global has not established its *ex gratia* defense.

C. Loss Ratio

Global's loss ratio defense is based on paragraph E of the Certificate, which describes the reinsurer's obligation to pay "loss" and "expenses" pursuant to "loss settlements" made by the reinsured as follows:

> Upon receipt of a definitive statement of loss, the Reinsurer shall promptly pay its proportion of such loss as set forth in the Declarations. In addition thereto, the Reinsurer shall pay its proportion of expenses (other than office expenses and payments to any salaried employee) incurred by the Company in the investigation and its proportion of court costs and interest on any judgment or award, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment. If there is no loss payment, the Reinsurer shall pay its proportion of such expenses only in respect of business accepted on a contributing excess basis and then only in the percentage stated in Item 4 of the Declarations in the first layer of participation.

Ex. 36 at 016553. Global argues that by requiring the reinsurer to pay "expenses" only when the reinsured has made a "loss payment," this provision of its own force limits Global's obligation to pay defense costs to those claims on which CNIC has made an indemnity payment. Global argues this interpretation is reinforced by the last sentence of the provision, which states that if there is no loss payment, Global will only pay expenses "in respect of business accepted on a contributing excess basis." *Id.* (As noted, the Certificate reflects the reinsurance provided was accepted not on a "contributing excess" but on an "excess of loss" basis. *Id.* at 016552.)

CNIC argues in light of the presumption that coverage provided by a reinsurance certificate is concurrent with the coverage provided by the reinsured policy, and because reinsurance certificates in general (and the Global Certificate in particular) are standard form contracts used to reinsure different types of insurance policies, paragraph E must be interpreted with reference to the particular policy being reinsured. CNIC further argues because the Certificate does not define the term "loss,"

the presumption of concurrency, as well as industry custom and practice, direct the Court to look to the reinsured policy for a definition. Thus, in the context of the 1976 Policy, which pays defense costs as part of "ultimate net loss," "loss," for purposes of paragraph E, should also be understood to include defense costs, and "expenses" should be understood to include to those expenses that are not part of the reinsurance loss, e.g., expenses incurred by CNIC in defending and settling the Marley declaratory judgment action.

As CNIC notes, where, as here, a "skeleton reinsurance contract" includes a following form clause,[24] "concurrency between the policy of reinsurance and the reinsured policy is presumed, such that a policy of reinsurance will be construed as offering the same terms, conditions and scope of coverage as exist in the reinsured policy, i.e., in the absence of explicit language in the policy of reinsurance to the contrary." *Commercial Union*, 413 F.3d at 128 (quotation omitted). Global argues that by specifying the manner in which the reinsured will pay "loss" and "expenses," paragraph E provides such "explicit language . . . to the contrary." As Global acknowledges, however, the Certificate does not provide a definition for the term "loss." Global does not dispute that where a term used in both a reinsurance certificate and a reinsured policy is defined only in the policy, the policy definition may also apply to the certificate. *See* Global's Proposed Findings at 65 n.3; *see also Pac. Emp'rs Ins. Co.*, 693 F.3d at 426 (noting the parties' agreement that the reinsured policy's definition of the term "occurrence" also applied to the reinsurance certificate, which did not separately define the term). Rather, Global argues the 1976 Policy does not define the term "loss," but instead refers to "ultimate net loss."

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[24] Here, the Certificate provides "[t]he liability of the Reinsurer . . . shall be subject in all respects to all the terms and conditions of the Company's policy except when otherwise specifically provided herein . . . ." *See* Ex. 36 at 016553.

Based on the parties' submissions and this Court's own research, there appears to be scant authority on point. The parties have cited to competing treatises, but it is not clear either addresses the precise issue presented here. CNIC cites two unreported decisions in which state trial courts have interpreted the term "loss" in an "excess of loss" reinsurance certificate to have the same meaning as "ultimate net loss" in the reinsured policy. *See Ace Prop. & Cas. Ins. Co. v. R & Q Reins. Co.*, No. 2010-02290, Order & Op. (Pa. Ct. Com. Pl. May 15, 2012); *Allstate Ins. Co. v. R & Q Reins. Co.*, No. 08-45451, Mem. Op. & Order (Ill. Cir. Ct. Feb. 5, 2010). In both cases, however, the issue appears to have been whether the insurer had miscalculated its retention by combining expenses and indemnity. Thus, although these cases provide some indirect support for CNIC's position, neither addressed a provision similar to paragraph E of Global's Certificate. Global, in turn, relies on *Pacific Employers Insurance Co. v. Global Reinsurance Corporation of America*, No. 09-6055, 2010 WL 1659760, at *4 (E.D. Pa. Apr. 23, 2010), in which the district court, interpreting a substantially identical provision in another certificate issued by Global, characterized the provision as "outlin[ing] the two separate proportions of losses and expenses that Global is obligated to pay pursuant to the Facultative Certificate." The issue in *Pacific Employers*, however, was whether the certificate's $1 million cap "encompasse[d] expenses or exclude[d] them." *Id.* at *3. The court thus had no occasion to address whether loss could include defense costs pursuant to an ultimate net loss reinsured policy.

In the absence of any clear authority on point, and because the Certificate does not define "loss" for purposes of the coverage provided therein, this Court is persuaded the presumption of concurrency requires the Court to interpret loss in a manner consistent with the 1976 Policy. Although Global's proferred definition of "loss" as the indemnity payments made by CNIC "might

be plausible in many contexts, here the follow-the-form clause should prevail." *Union Carbide Corp. v. Affiliated FM Ins. Co.*, 16 N.Y.3d 419, 424 (N.Y. 2011) (rejecting argument that excess policy with an "aggregate" limit of liability provided a single aggregate limit where underlying policy provided an "annual aggregate" and excess policy included a follow the form clause). As the court in *Union Carbide* recognized, "[s]uch clauses serve the important purpose of allowing an insured . . . that deals with many insurers for the same risk to obtain uniform coverage, and to know, without a minute policy-by-policy analysis, the nature and extent of that coverage." *Id.*

Further, to the extent the Certificate is ambiguous, this Court credits the testimony of Resolute Vice President Judith Harnadek and CNIC's expert Don Salyer that where the term "loss" is not defined in a reinsurance certificate, the custom and practice in the industry is to look to the reinsured policy for a definition. At trial, Harnadek stated, based on her 25 years of working with reinsurance contracts, that "the terms 'loss' and 'expense' have to be understood and applied . . . with respect to the particular policy that's being reinsured in terms of facultative reinsurance," and that to determine what constitutes "loss" under the reinsurance contract, "[y]ou need to look at how does the reinsured policy define 'loss.'" 2/1/12 Trial Tr. 47. As Harnadek credibly explained, "[i]f the reinsured policy defines 'loss' to include defense expense, then for reinsurance purposes, those defense expenses are part of 'loss.' On the other hand, if there's a policy that pays defense costs in addition to its limit or outside of the policy limit, in that case 'loss' would be the indemnity payment only, and 'expense' would be the expense in addition to limit." *Id.* Based on his 40 years of experience in the insurance and reinsurance industry, Salyer testified to the same effect. *Id.* at 98 (stating where a reinsurance certificate does not define the term "loss," the custom and practice in 1977 would have been to "look at the original policy that's being reinsured" to determine what "loss"

includes).[25]

Because the Court finds indemnity and defense costs paid as ultimate net loss are properly combined as loss under Global's Certificate, and because Global does not dispute that CNIC has properly billed Global for the declaratory judgment expenses CNIC incurred in defending and settling the Marley declaratory judgment action, the Court rejects Global's loss ratio defense.

D. Endorsement

Finally, Global argues it has no present obligation to pay CNIC's billings because the endorsement extending the expiration date of its Certificate requires CNIC to satisfy two separate $10 million retentions—one for the Certificate's initial one-year policy period (December 31, 1976, to December 31, 1977) and one for the seven-month extension period (December 31, 1977, to August 1, 1978)—neither of which has been fully exhausted to date. Global's argument focuses on the second paragraph of the endorsement, which provides:

> IT IS FURTHER UNDERSTOOD AND AGREED THAT EFFECTIVE FOR THE PERIOD OF 12/31/77 TO 08/01/78 THE UNDERLYING AGGREGATE LIMITS WHERE APPLICABLE SHALL BE UNIMPAIRED AND FOR THE PURPOSE OF THIS REINSURANCE ONLY OCCURRENCES TAKING PLACE DURING THE TERM OF 12/31/77 TO 08/01/78 SHALL BE CONSIDERED IN DETERMINING THE EXTENT OF ANY EXHAUSTION OF THE UNDERLYING AGGREGATE LIMITS.

Ex. 36 at 016550.[26]

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[25] Although Salyer did not recall ever handling a claim that required him to apply the language of paragraph E, given his extensive experience in the insurance and reinsurance industry, including experience underwriting following form excess policies (which follow the form of the underlying primary policy in a manner similar to facultative reinsurance certificates), the Court credits his testimony regarding industry custom and practice for defining an undefined term in a following form policy.

[26] The parties agree the first paragraph of the endorsement simply reflects Global's agreement to extend the expiration date of the Certificate in consideration of an additional premium.

Global argues by requiring the "underlying aggregate limits" (i.e., CNIC's $10 million retention) to be "unimpaired" effective for the Certificate's seven-month extension period, the endorsement requires CNIC to provide a new $10 million retention for the extension period. CNIC argues the use of the term "unimpaired" does not require a new $10 million retention, but simply requires that the existing underlying aggregate limits be undiminished as of the Certificate's effective date. The parties agree the endorsement contemplated that the underlying aggregate limits available for the extension period—whether a new $10 million retention or the existing and undiminished $10 million retention—could be eroded only by occurrences during the extension period.

Based on the plain language of the Certificate, the Court finds CNIC has the better argument. As noted, the presumption of concurrency that flows from a follow the form clause means a reinsurance certificate "will be construed as offering the same terms, conditions and scope of coverage as exist in the reinsured policy, i.e., in the absence of explicit language in the policy of reinsurance to the contrary." *Commercial Union*, 413 F.3d at 128 (quotation omitted). This presumption that reinsurance "dovetails with the underlying liability insurance" can be overridden, but only "by clear language in the certificate that cuts off liability under the reinsurance policy even where the cedent is liable to the insured." *Am. Emp'rs Ins. Co. v. Swiss Reins. Am. Corp.*, 413 F.3d 129, 137 (1st Cir. 2005). Having reserved its rights with respect to the number of aggregate limits issue with Marley, CNIC is currently paying Marley claims pursuant to the Settlement and Funding Agreement based on one $25 million aggregate limit. Therefore, Global must follow CNIC's settlement unless the Certificate clearly provides to the contrary. *See Commercial Union*, 413 F.3d at 128 ("[I]f sufficiently clear, specific limits in the certificate control over the general aim of concurrence and ordinary 'follow' clauses."); *cf. Gerling*, 419 F.3d at 186-89 (applying the follow

the fortunes doctrine to an insurer's post-settlement allocation based on its pre-settlement position on number of occurrences, which the settlement explicitly declined to resolve).

Read literally, the endorsement requires only that the underlying aggregate limits be "unimpaired," i.e., undiminished or having incurred no losses, for the extension period, and that only occurrences taking place during the extension period be used to exhaust the underlying aggregate limits. The endorsement does not say a new or separate underlying aggregate limit shall apply during the extension period, nor does it say the extension period shall constitute a new annual period. Because the endorsement does not clearly provide that CNIC must exhaust two $10 million retentions, it is insufficient to overcome the presumption of concurrency.

At best the endorsement is ambiguous as to whether the "unimpaired" underlying aggregate limits to be available during the extension period are a new $10 million retention or the full amount of the existing $10 million retention. But even if the endorsement is regarded as ambiguous, the limited extrinsic evidence in the record does not favor Global's interpretation.

The evidence produced at trial reflects that as of the Certificate's December 31, 1977, effective date, the underlying aggregate limit was, in fact, unimpaired. Indeed, the policies underlying CNIC's 1976 Policy (one with a policy period of August 1, 1976, to August 1, 1977, the other effective from August 1, 1977, to August 1, 1978) were not exhausted until September 1984 and October 1982, respectively. Ex. 53 at 04222. Therefore, the 1976 Policy had not been impacted by any losses as of December 31, 1977.

CNIC's expert, Don Salyer, also testified that at the time the endorsement was written, the generally understood practice for determining the date of loss for bodily injury was the date the injury manifested itself. 2/1/12 Trial Tr. 98-99. Because the parties would have contemplated a

manifestation trigger at the time the endorsement was written, the fact they agreed that only occurrences during the seven-month extension period would erode the underlying aggregate limit does not suggest they contemplated there would be a new underlying aggregate limit for the extension period. Rather, if the aggregate limit was unimpaired at year's end, when the initial one-year policy period was essentially over, it would be expected that any new bodily injury claims would manifest themselves in the extension period.[27] Accordingly, the endorsement is entirely consistent with CNIC's theory.

Global relies heavily on the deposition testimony of Roger Hughes, the underwriter who signed the Certificate and the endorsement. While Hughes testified the intent of the endorsement was that CNIC would "pay an aggregate limit of the first 12 months and . . . a separate aggregate for the second 7 months," he agreed the endorsement itself does not say anything about CNIC taking two $10 million retentions before it can bill Global. Hughes Dep. 101-02. The only evidence of any communications between Global and CNIC regarding the endorsement is an exchange of telexes between Kenneth Mann of Cravens and Hughes, but these tersely worded communications are themselves at best ambiguous and do not clearly convey a request for two separate retentions.[28]

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[27] It was not until the early 1980s, several years after the endorsement was written, that the theory of continuous or triple trigger was recognized. *Id.* at 99. As noted, under a continuous trigger, bodily injury is deemed to have occurred continuously from the date of the claimant's first exposure to asbestos-containing materials through manifestation of an asbestos-related injury, thereby triggering all policies in effect during this period. *See id.* at 99-100. The parties thus would not have contemplated the possibility of a continuous trigger at the time the endorsement was written. Based on the later-adopted continuous trigger theory, however, for a claimant whose injury period spans both portions of the 1976 Policy's 19-month policy period, the injury would be an occurrence in the first 12 months of the period and is also an occurrence during the seven-month extension period.

[28] When Mann requested Global's agreement to extend the Certificate's expiration date to August 1, 1978, Hughes responded the following day, stating "SUBJECT TO CONF[I]RMATION THAT AGG. COVER IS REINSTATED OF 12/31/77 WE CAN AGREE TO EXT. TO 8/1/78, IF AGG.

Further, Hughes admitted he does not know who drafted the endorsement, does not recall underwriting the certificate or the endorsement, and does not recall having any discussion with anyone at CNIC regarding the request to extend the certificate. Hughes Dep. 34, 39, 96, 101. The Court therefore finds Hughes's interpretation of the intention and meaning of the endorsement is entitled to little weight.

Global also asserts an exchange of correspondence between it and Cravens in the mid-1980s supports its interpretation of the endorsement. In January 1984, after CNIC had placed Global on notice of approximately $130,000 in product losses under the product aggregate of the 1976 Policy, a Global claim supervisor wrote to Cravens taking the position that "[w]hen this policy expiration date was extended it was done with the understanding that any loss between 12/31/77 and 8/1/78 would comprise a new aggregate period," and requesting confirmation "that the underlying limits for both aggregates have not been exhausted . . . ." Ex. 125. When Cravens responded in June 1985, the claim handler noted he had "not attempt[ed] to separate out the 12/31/76 through 12/31/77 claims and the 12/31/77 through 8/1[/]78 claims," stating "[t]his will only become an issue if the losses for either period exceed the $1,000,000 1st layer of coverage." Ex. 126. Global argues this response reflects Cravens's acquiescence in its position; however, the letter can also be regarded as noncommittal. In any event, this single exchange is not sufficient to make Global's interpretation the more plausible.

Finally, Global argues CNIC is in fact paying Marley's claims pursuant to two aggregate

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PERIOD IS TO BE 12 PLUS 8 MOS." Ex. 45. Although Hughes's request for confirmation that "agg. cover" would be "reinstated" for the extension period could arguably be interpreted as requesting a new set of aggregate limits, any such inference is undercut by Hughes's reference to a single aggregate period of "12 plus 8" months.

limits, but this argument, which is based primarily on the Marley settlement documents and bills and reports prepared by PACE on Marley's behalf, ignores CNIC's reservation of rights with Marley on this issue.

In sum, the limited extrinsic evidence does not persuade this Court that Global's interpretation of the endorsement is correct. Accordingly, this Court finds the language of the endorsement does not, of its own force, create two separate $10 million underlying aggregate limits.

For the reasons set forth above, the Court finds Global is not collaterally estopped from raising its "*ex gratia*" and loss ratio defenses to CNIC's billings under the Global Certificate; however, the Court finds those defenses, as well as Global's defense based on the endorsement to the Certificate, to be without merit. Accordingly, judgment will be entered in favor of CNIC and against Global on CNIC's breach of contract and declaratory judgment claims and on Global's counterclaim.

An appropriate judgment follows.