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

GREENE, TWEED & CO., INC.	:	CIVIL ACTION
v.	:	
HARTFORD ACCIDENT & INDEMNITY CO., et al.	:	NO. 03-3637

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

April 21, 2006

Greene, Tweed & Company, Inc. ("Greene Tweed") filed a Complaint for Declaratory Judgment, pursuant to 28 U.S.C. § 2201, against several insurance companies, including defendants American Home Assurance Company ("American Home") and Allstate Insurance Company ("Allstate"), both of whom issued Umbrella Excess Liability ("UEL") insurance policies to Greene Tweed. Greene Tweed seeks a declaration as to the extent of coverage under these UEL policies for personal injury claims asserted against Greene Tweed arising from alleged exposure to asbestos in products manufactured and/or sold by Greene Tweed.

On May 14, 2004, Greene Tweed filed a Motion for Partial Summary Judgment against American Home and Allstate on the Issues of Number of Occurrences and Non-Cumulation (Doc. No. 51). On the same date, American Home filed a Motion for Partial Summary Judgment on the Subjects of Number of Occurrences and Non-Cumulation (Doc. No. 53). Allstate joins in the motion filed by American Home. See Letter dated May 14, 2004 to the Honorable Charles R. Weiner (Doc. No. 78). Pursuant to a stipulation of counsel, on November 4, 2005, Judge Weiner referred the cross-motions for summary judgment to the undersigned for

disposition pursuant to 28 U.S.C. § 636(a). The court held oral argument on the motions on November 22, 2005 (Doc. No. 74). This Memorandum of Decision will address the issues raised in the cross-motions for summary judgment.

I. UNDISPUTED FACTS

According to Greene Tweed's complaint, it "has been named as a defendant in thousands of underlying actions alleging that it is subject to tort liability for bodily injury, sickness, and disease allegedly sustained by the underlying claimants as a result of exposure to asbestos-containing products allegedly manufactured by Greene Tweed." (First Amended Complaint ¶ 10.) Today, Greene Tweed faces approximately 60,000 asbestos claims, filed in jurisdictions across the United States. (Crowther Suppl. Decl. ¶ 8, N.T., 11/22/05, at 11.) The parties agree that these thousands of asbestos claims will trigger coverage under the American Home and Allstate Policies, pursuant to the "multiple-trigger" theory of insurance coverage, adopted in J.H. France Refractories v. Allstate Insurance Co., 626 A.2d 502 (Pa. 1993).[1] American Home issued a UEL Policy,[2] BE 337-30-83, to Greene Tweed for the period of

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[1] In J.H. France, the Pennsylvania Supreme Court held that all stages of the asbestosis disease process, from initial exposure until incapacitation, cause "bodily injury" which triggers an insurer's obligation to indemnify, and that each insurer which issued a policy during the disease process is liable for the entire claim up to the policy limits. 626 A.2d at 506-08. Under this approach, a policy holder is "free to select the policy or policies under which it [will] be indemnified." Id. at 508. However, excess policies are "triggered" or required to pay only after the directly underlying primary policies have been exhausted. Koppers Co., Inc. v. Aetna Cas. & Surety Co., 98 F.3d 1440, 1454 (3d Cir. 1996).

[2] "An excess umbrella policy is generally designed to provide coverage in excess of the insured's policy with a primary insurer, but only if the underlying insurer covers the claim." I.C.D. Indus., Inc. v. Fed. Ins. Co., 879 F. Supp. 480, 482 n.1 (E.D. Pa. 1995). "The purpose of excess insurance is to provide a fallback for the insured. In the event no other insurance is available, or other insurance is insufficient, the excess insurer stands ready to fill in the gap. The excess insurer, in effect, provides insurance against the risk of insufficient insurance." Contrans,

December 31, 1973 to December 31, 1976 (hereinafter referred to as "American Home UEL Policy" or "American Home Policy"). (American Home Mot. Ex. C.) Defendant Allstate is the successor-in-interest to Northbrook Excess and Surplus Insurance Company ("Northbrook"). Northbrook issued an Excess Umbrella Coverage Policy, No. 63000329, to Greene Tweed for the period May 3, 1974 to December 31, 1977 (hereinafter referred to as "Allstate UEL Policy" or "Allstate Policy") (Crowther Decl. Ex. 2).

For the period of 1965 to 1977, Greene Tweed had primary liability policies with Hartford Accident & Indemnity Company ("Hartford") and Admiral Insurance Company, with limits ranging from $300,000 to $1 million. The policy limits of these primary polices are close to being exhausted as a result of the thousands of asbestos claims. For each of the years 1970 and 1971, Greene Tweed had an excess liability insurance policy from Hartford with a one-year term in the amount of $2 million. In the years 1972 and 1973, the amounts of the one-year Hartford excess policies increased to $10,000,000. In December, 1973, Greene Tweed replaced the Hartford excess policy with the American Home UEL Policy which had a term of three-years. Furthermore, on May 3, 1974, Greene Tweed purchased the Allstate UEL Policy, with a three-year and eight month term, to provide coverage in excess of the UEL coverage provided by American Home.[3]

Inc. v. Ryder Truck Rental, Inc., 836 F.2d 163, 171 (3d Cir. 1987).

[3] In Exhibit 3 to the Declaration of George L. Crowther, an administrator at Greene Tweed, plaintiff provides a chart that outlines the history of primary and excess insurance policies purchased by the company. During the oral argument on November 22, 2005, Greene Tweed provided an update of this chart which shows the amounts of coverage that have been exhausted to date. This updated chart and other exhibits used during the oral argument have been filed with the Clerk of Court. See also American Home's Mem. of Law Supp. Mot. Exs. A and B.

II. DISCUSSION

The cross-motions for summary judgment raise three issues for the court's determination: (1) Do the asbestos claims against Greene Tweed constitute one occurrence under the American Home and Allstate Policies?; (2) Is there only one occurrence limit applicable for the multi-year policies?; and (3) Does the "Prior Insurance and Non-Cumulation of Liability" provision in the American Home Policy require a reduction in the limits of liability in the policy by any amounts due for the same loss under any prior excess policy?

The parties agree that Pennsylvania law applies to all issues arising under the American Home and Allstate Policies.

A. Interpretation of Insurance Contracts

The interpretation of an insurance policy is a question of law properly decided by the court. Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). See also PECO Energy Co. v. Boden, 64 F.3d 852, 855 (3d Cir. 1995) ("In Pennsylvania, interpreting an insurance contract is a question of law to be resolved by a court.") (citations omitted). The principles guiding the interpretation of insurance contracts are well-settled under Pennsylvania law. The Third Circuit Court of Appeals stated the law regarding interpretation of insurance contracts as follows:

> When the language of an insurance contract is clear and unambiguous, a court is required to enforce that language. Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563, 566 (1983). Furthermore, if possible, "a court should interpret the policy so as to avoid ambiguities and give effect to all of its provisions." Little v. MGIC Indemn. Corp., 836 F.2d 789, 793 (3d Cir. 1987).
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> The courts have held, however, that "if the policy provision is reasonably susceptible to more than one interpretation, it is ambiguous." McMillan [v. State

> Mut. Life Assur. Co.], 922 F.2d [1073,] 1075 [(3d Cir. 1990)]. "In determining whether a contract is ambiguous, the court must examine the questionable term or language in the context of the entire policy and decide whether the contract is 'reasonably susceptible of different constructions and capable of being understood in more than one sense.'" Reliance Ins. Co. [v. Moessner], 121 F.3d [895,] 900 [3d Cir. 1997)] (citing Gamble Farm Inn, Inc. v. Selective Ins. Co., 440 Pa. Super. 501, 656 A.2d 142, 143-44 (1995) (quoting Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385, 390 (1986))); see also Little, 836 F.2d at 794 (holding that, even if insurer's interpretation is reasonable, if insured's interpretation is also reasonable, then provision is ambiguous and should be construed in favor of insured). "Ambiguous provisions in an insurance policy must be construed against the insurer and in favor of the insured; any reasonable interpretation offered by the insured, therefore, must control." McMillan, 922 F.2d at 1075.

Med. Protective Co., 198 F.3d at 103-04.

B. Number of Occurrences

American Home and Allstate argue that the asbestos claims against Greene Tweed arose from a single occurrence, and therefore, the limits of liability per occurrence under each policy are $10 million and $15 million respectively. Greene Tweed argues that the asbestos claims constitute multiple occurrences and therefore the policies' limits of liability are $30 million for American Home and $60 million for Allstate. (N.T., 11/22/05, at 16-17.)

The American Home Policy provides coverage only for injuries caused by or arising out of an "occurrence." The Declarations and Insuring Agreements of the American Home Policy state, in pertinent part, as follows:

> In consideration of the payment of the premium, in reliance upon the statements in the Declarations made a part hereof and subject to the limits of liability, exclusions, conditions and other terms of this policy, the Company agrees with the insured named in the Declarations ... [t]o pay on behalf of the insured the ultimate net loss in excess of the retained limit hereinafter defined, which the insured shall become legally obligated to pay as damages by reason of the liability imposed upon the insured by law ... because of -
>
> (a) Personal Injury, including death at any time resulting therefrom,

(b) Property Damage,

(c) Advertising Liability,

as defined herein and caused by or arising out of an occurrence.

American Home Policy, Section I (Insuring Agreements).

The term "occurrence" is defined in the American Home Policy, in pertinent part, as follows:

> With respect to Personal Injury and Property Damage the term "Occurrence" means an event, including continuous or repeated exposure to conditions, which result [sic] in Personal Injury or Property Damage neither expected nor intended from the standpoint of the insured. All such exposure to substantially the same general conditions shall be deemed one occurrence . . . .

American Home Policy ¶ 8 (Definitions) (emphasis added).

The last sentence of the above paragraph has been referred to by the parties as an "occurrence deemer" clause. The American Home Policy also contains a Limit of Liability provision, limiting its liability under the policy to $10 million per occurrence. See American Home Policy, Item 3 (Declarations Page), Section III (Insuring Agreements).

The Allstate UEL Policy provides the following:

> 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 imposed upon the Insured by law, or assumed under contract or agreement by the Insured for damages, direct or consequential and expenses on account of:
>
> (a) Personal Injuries, including death at any time resulting therefrom,
>
> (b) Property Damage,
>
> (c) Advertising Liability,

caused by or arising out of each occurrence happening anywhere in the world, and arising out of the hazards covered by and as defined in the Underlying Umbrella Policies stated below and issued by the "Underlying Umbrella Insurers".

UNDERLYING UMBRELLA INSURERS AND POLICY NUMBER:

American Home Assurance Company
BE 337 30 83 Expiration December 31, 1976
and Renewals thereof if such renewal
contains same definitions, exclusions & conditions.

Allstate Policy ¶ 1 (Insuring Agreements). The Allstate Policy limited the insurer's liability under the policy to $15 million per occurrence. Allstate Policy ¶ 2 – Limit of Liability (Insuring Agreements).

The court finds that the determination of whether the asbestos claims filed against Greene Tweed are one or more occurrences is governed by the Third Circuit's recent decision in Liberty Mutual Insurance Co. v. Treesdale, Inc., 418 F.3d 330 (3d Cir. 2005). In Treesdale, the insured, Treesdale, Inc., manufactured and sold a product known as "Soffelex," which contained asbestos. Several thousand asbestos exposure claims were filed against Treesdale by steel workers who claimed to have been exposed to Treesdale's products while working in the steel mills. Id. at 332. Liberty Mutual issued several primary policies and UEL coverage to Treesdale. After the primary coverage was exhausted, Treesdale demanded Liberty Mutual provide coverage under the UEL policies. As is the case in the American Home and Allstate Policies at issue in this case, the Liberty Mutual policies provided policy limits in a certain amount per occurrence and in the aggregate. Id. at 332-33. Thus, the court had to determine whether the thousands of asbestos claims pending against Treesdale amounted to one occurrence or multiple occurrences. Liberty Mutual contended that all of the asbestos claims arose from a single occurrence, while

Treesdale contended that the asbestos claims arose from multiple occurrences, i.e., each claimant's expose to asbestos. Id. at 334.

The pertinent provisions of the Liberty Mutual policies were almost identical to those contained in the American Home and Allstate Policies. The Liberty Mutual UEL policies provide the following:

> Regardless of the number of insureds under this policy or the number of persons or organizations who sustain personal injury, property damage, or advertising injury or damage, the company's liability is limited as follows:
>
> Each occurrence - - The limit of liability stated in the declarations as applicable to "each occurrence" is the limit of the company's liability for all damages, direct and consequential, because of all personal injury, property damage, or advertising injury or damage sustained by one or more persons or organizations as the result of any one occurrence.
>
> * * * *
>
> For the purpose of determining the limits of the company's liability:
>
> (1) all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence.

Id. at 332-33 (footnotes omitted). The Liberty Mutual UEL policies defined "occurrence" as "injurious exposure to conditions, which results in personal injury, property damage, or advertising injury or damage neither expected nor intended from the standpoint of the insured." Id. at 333 n.4.

The Third Circuit noted that "the accepted purpose of defining 'an occurrence or event' is to limit liability, and in the insurance industry 'occurrence' is commonly understood to mean all loss caused by a single act or related events." Id. at 335-36 (quoting Scirex Corp. v. Fed. Ins. Co., 313 F.3d 841, 852 (3d Cir. 2002)). To determine whether there was a single

occurrence, the court in Treesdale applied the cause of loss test it enunciated in Appalachian Insurance Co. v. Liberty Mutual Insurance Co., 676 F.2d 56 (3d Cir. 1982). In Appalachian, the court was faced with the issue of whether multiple sex discrimination claims were multiple occurrences. In finding that the many discrimination claims were but one occurrence, the court stated the following:

> The general rule is that an occurrence is determined by the cause or causes of the resulting injury. The majority of jurisdictions employ the cause theory. Using this analysis, the court asks if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.
>
> Applying the general rule to the facts of this case we agree with the district court's finding that there was but one occurrence for purposes of policy coverage. The injuries for which Liberty was liable all resulted from a common source: Liberty's discriminatory employment policies. Therefore, the single occurrence, for purposes of policy coverage, should be defined as Liberty's adoption of its discriminatory employment policies in 1965. The fact that there were multiple injuries and that they were of different magnitudes and that injuries extended over a period of time does not alter our conclusion that there was a single occurrence. As long as the injuries stem from one proximate cause there is a single occurrence. Indeed, the definition of the term "occurrence" in the Appalachian policy contemplates that one occurrence may have multiple and disparate impacts on individuals and that injuries may extend over a period of time.

Id. at 61 (citations, internal quotations, footnotes and bracket omitted).

Applying the Appalachian cause of loss test to the asbestos claims made against Treesdale, the Third Circuit affirmed the district court's conclusion that the asbestos claimants' "injuries stem from a common source, that is, the manufacture and sale of the asbestos-containing products," and that "the policy language is clear and unambiguous that the injuries arising from this common source must be treated as resulting from a single occurrence." 418 F.3d at 335.

In the instant case, the 60,000 asbestos claims against Greene Tweed have a common source or cause, that is, Greene Tweed's manufacture and sale of asbestos products. Because all the persons who filed claims against Greene Tweed were exposed "to substantially the same general conditions," there is only one occurrence under the clear and unambiguous provisions of the American Home and Allstate Policies. Accordingly, without consideration of the non-cumulation clauses, discussed later, the limit of American Home's liability to Greene Tweed is $10 million for the asbestos claims and Allstate's limit of liability is $15 million for the asbestos claims.

Greene Tweed attempts to distinguish Treesdale by pointing out that Treesdale only manufactured one asbestos product, whereas Greene Tweed made several asbestos products which are the subject of the many claims against it. Specifically, Treesdale alleges that "Greene Tweed manufactured and sold at least 105 different asbestos-containing products, including braided packing products, sheet packing and gaskets, and molded packing used in diverse industrial applications and sold it in at least 33 different states and fifteen foreign countries." (Pl.'s. Resp. to Second Notice of Suppl. Auth. at 5 (citing Crowther Suppl. Decl. ¶¶ 12-19)). Greene Tweed argues that "[t]here is simply no factual basis in this record to hold that 60,000 underlying asbestos claimants who were exposed to 105 different asbestos products used in very different industrial applications in at least eighteen states during different periods of time were injured by the same occurrence." Id.

The Treesdale decision makes it clear that when determining the number of occurrences under Pennsylvania law, the inquiry must focus on the underlying circumstances that resulted in the claim for damages rather than on the number of persons injured, the variety of

injuries, the variety of conditions, or the time frame within which the injuries occurred. The Liberty Mutual UEL policy in Treesdale had a provision in the Limits of Liability section, which is similar to the "occurrence deemer" provision contained in the American Home and Allstate Policies. The provision in the Liberty Mutual UEL policy stated the following: "For the purpose of determining the limits of the company's liability . . . all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence." Id. at 336. The court in Treesdale stated that the above section "unambiguously addresses the situation where, as here, many people allege personal injuries in different years arising from one occurrence. Thus, we think that any fair reading of the Limits of Liability provision establishes that all injuries arising from the same source arise from one occurrence." Id.

The American Home and Allstate Policies have a similar "occurrence deemer" clause. The term "occurrence" is similarly defined as "an event, including continuous or repeated exposure to conditions, which result [sic] in Personal Injury or Property Damage neither expected nor intended from the standpoint of the insured. All such exposure to substantially the same general conditions shall be deemed one occurrence." American Home Policy ¶ 8 (Definitions). The Allstate Policy adopted this definition. See Allstate Policy ¶ 1 (Insuring Agreements). Under this provision, damage which results from "substantially the same general conditions" constitutes a single occurrence. Even though many different people allegedly were injured by Greene Tweed products containing asbestos that were distributed at different times and places, all liability resulted from exposure to substantially the same general condition - - the

presence of asbestos in Greene Tweed's products. Thus, there was only one occurrence under the terms of the American Home and Allstate Policies.

One district court decision, cited with approval by the Treesdale court, supports this conclusion. See Treesdale, 418 F.3d at 339 n.13. In Air Products & Chemicals, Inc. v. Hartford Accident & Indemnity Co., 707 F. Supp. 762, 768 (E.D. Pa. 1989), aff'd in part and vacated in part on other grounds, 25 F.3d 177 (3d Cir. 1994), the court addressed an insurance coverage dispute for hundreds of underlying claims arising out of the manufacture and sale of electrical wire welding products, insulation products containing asbestos and heat-treating kits containing asbestos insulation materials. Id. at 764. The insurer in Air Products argued that there were multiple occurrences in the underlying asbestos and welding litigation, pointing out that "the claimants' alleged injuries resulted from exposure to a number of asbestos and welding products, that the claimants' exposure occurred under a variety of conditions, and that different claimants allege different injuries." Id. at 773. The court rejected this argument. After applying the Third Circuit's cause test announced in Appalachian, the court stated the following:

> The causal inquiry supports the view that the claims in the underlying asbestos litigation and the claims in the underlying welding litigation each arise from single occurrences – the continuing manufacture and sale by plaintiff of the products involved in each set of lawsuits.

Id. Although the court acknowledged that the claimant's alleged injuries resulted from exposure to "a number of asbestos and welding products," the court found that in the underlying litigation, "the claimants' alleged injuries resulted from a single proximate cause - - the continuing sale of the plaintiff's asbestos-containing products and welding products." Id. Accordingly, the court concluded that the manufacture and sale of all of the asbestos products constituted one

occurrence. Id. See also Westinghouse Elec. Corp. v. Am. Home Assur. Co., 2004 WL 1878764, at *30 (N.J. Super. Ct. July 8, 2004) (unpublished decision applying Pennsylvania law) ("Courts applying the cause test have explicitly rejected plaintiff's argument that the number of claims or products or decisions related to asbestos is relevant to the number-of-occurrences inquiry."), cert. denied, 861 A.2d 845 (N.J. 2004).

In the case at bar, the underlying asbestos claims against Greene Tweed all involve claims of bodily injury arising out of continuous or repeated exposure to substantially the same general conditions, i.e., exposure to asbestos. (First Amended Complaint ¶ 10.) Thus, under the American Home and Allstate Policies, the claims constitute one and the same occurrence.

Greene Tweed also contends that the above "occurrence deemer" provision of the American Home and Allstate Policies is ambiguous and, under the doctrine of contra proferentem, it must be construed in favor of Greene Tweed. See Pl.'s. Resp. to Second Notice of Suppl. Auth. at 12; N.T., 11/22/05, at 45-46. Under Pennsylvania's doctrine of contra proferentem, an ambiguous provision in an insurance policy must be strictly construed against the insurance company and liberally construed in favor of the insured. McMillian v. State Mut. Life Assur. Co. of Am., 922 F.2d 1073, 1075 (3d Cir. 1990). However, clear policy language must be given effect, and courts should not torture the language to create ambiguities but should construe the policy provisions to avoid ambiguities. Selko v. Home Ins. Co., 139 F.3d 146, 152 n.3 (3d Cir. 1998). The court finds the provision to be clear and unambiguous. Moreover, the "occurrence deemer" clauses in the American Home and Allstate Policies are almost identical to the language in the policy in the Treesdale case which the Third Circuit found to be

unambiguous. Treesdale, 418 F.2d at 336. See also Colt Indus. Inc. v. Aetna Cas. & Sur. Co., 1989 WL 147615, at *6 (E.D. Pa. Dec. 6, 1989) (finding occurrence deemer provision to be "plain" and unambiguous).

Greene Tweed also argues this court's finding that the multitude of asbestos claims are one occurrence under each of the American Home and Allstate Policies defeats its reasonable expectation of coverage and that, under Pennsylvania law, this expectation must be honored even if it conflicts with the provisions of the policy. (Pl.'s Mem. of Law Supp. Mot. at 15; Pl.'s Reply at 11.) However, the Third Circuit recently emphasized that under Pennsylvania law, the court must apply the plain meaning of unambiguous policy language, even if it is contrary to the reasonable expectation of an insured. Canal Ins. Co. v. Underwriters at Lloyd's London, 435 F.3d 431, 439-40 (3d Cir. 2006). In Canal, the court found that the reasonable expectation of an insured will trump the clear and unambiguous language of a policy only when two circumstances exist: (1) where there is a non-commercial insured and the policy terms are not readily apparent; and (2) where a non-commercial insured is deceived by an insurance agent. Id. at 440. Greene Tweed is a commercial entity, and it does not claim it was deceived by an agent of either insurance company. Therefore, the court cannot ignore the unambiguous policy language in the American Home and Allstate Policies merely because Greene Tweed says that the policy provision is contrary to its reasonable expectation.[4]

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[4] Greene Tweed argues that the court should follow the expansive interpretation of Pennsylvania's reasonable expectations doctrine as adopted the Third Circuit in Medical Protective, see 198 F.3d at 106-07, as opposed to the narrower view espoused by the court in Canal. However, the Pennsylvania appellate courts have recently retreated from the broader application of the doctrine and now only apply it in "very limited circumstances." Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 109 n.8 (Pa. 1999). See also Thomas J. Rueter and Joshua H. Roberts, Pennsylvania's Reasonable Expectations Doctrine: The Third

Finally, Greene Tweed urges this court to find that at "each industrial site at which claimants have alleged exposure to asbestos from Greene Tweed's products constitutes a separate occurrence." (Pl.'s. Resp. to Second Notice of Suppl. Auth. at 7.) In support of this argument, Greene Tweed relies upon Kvaerner U.S. Inc. v. One Beacon Insurance Co., 2005 WL 2001117 (C.P. Phila. Aug. 19, 2005). This case is easily distinguishable from the facts of Greene Tweed's case. In Kvaerner, the insured was subject to numerous liability claims "by persons alleging asbestos related bodily injury resulting from claimed exposure to asbestos while working at sites where Kvaerner's predecessors allegedly performed construction or other activities." Id. at *1. Unlike Greene Tweed, Kvaerner did not manufacture and sell asbestos-containing products that were distributed into the market place. Instead, Kvaerner's liability to the claimants arose from "the construction of furnaces at different sites, at different times and for varying lengths of time." Id. at *4. The Court of Common Pleas held that "the claims for each site should be considered one occurrence." Id. The court explained as follows:

> Kvaerner's activities which triggered the underlying claims did not arise from a single, negligent practice that could be considered one cause, such as distributing a uniformly defective product from a single manufacturer or selling a product containing asbestos from one location. Instead, the exposure to asbestos arose from the construction of furnaces at different sites, at different times and for varying lengths of time. Consequently, the claimants that were exposed to asbestos at the same location and at the same time were exposed to "substantially the same general condition." Accordingly, the claims for each site should be considered one occurrence.

Circuit's Perspective, 45 Vill. L. Rev. 581, 624 (2000) (explaining that Pennsylvania law had changed so that insured's reasonable expectation of coverage will not always prevail over clear and unambiguous language). Therefore, this court will apply the Canal articulation of the reasonable expectations doctrine because it accurately reflects the current state of Pennsylvania law.

Id. Unlike Greene Tweed, Kvaerner's liability was premised on an allegation of negligent construction of furnaces at different work sites where asbestos products manufactured by others were used by Kvaerner to construct the furnaces. The claims against Kvaerner did not arise, as in Greene Tweed, from the manufacturing or selling of products containing asbestos. Thus, the circumstances in Greene Tweed's case are more akin to those in Treesdale than in Kvaerner, and this court is bound to follow the Third Circuit's interpretation of Pennsylvania law. Accordingly, this court rejects Greene Tweed's argument that there was more than one occurrence as the result of its manufacture and sale of asbestos-containing products. Instead, the court finds that the manufacture and/or sale of asbestos-containing products constitutes a single occurrence for purposes of the limits of liability in the American Home and Allstate Policies.

C. The Multi-Year Policies Afford Only A Single Occurrence Limit

As noted earlier, the American Home and Allstate Policies were, respectively, three years and three years and eight-months policies. Greene Tweed contends that the per occurrence limits apply separately for each year of the multi-year policies.

The relevant American Home Policy language, set forth below, unambiguously provides that American Home shall be liable to pay, in excess of underlying policies, $10,000,000 "Single Limit any one occurrence Personal Injury or Property Damage or Advertising Liability or any combination thereof," and then separately provides that aggregate limits for all occurrences, where applicable, will be $10,000,000 "for each annual period." (American Home Policy, Item 3 (Declarations Page) (emphasis added).) The Limit of Liability provision in the Policy, Item 3 in the Declarations Page, specifically states:

The limit of the Company's liability shall be as stated herein subject to all the terms of this policy having reference thereto

(A) $10,000,000 Single Limit any one occurrence Personal Injury or Property Damage or Advertising Liability or any combination thereof.

in excess of

(1) the amount recoverable under the underlying insurance as set out in the attached Schedule A.

or

(2) $10,000 ultimate net loss in respect of each occurrence not covered by said underlying insurance.

(B) $10,000,000 in the aggregate for each annual period in accordance with Insuring Agreement III.

American Home Policy, Item 3 (Declarations Page) (emphasis added). Section III of the Insuring Agreements in the American Home Policy specifies, in pertinent part, that:

(a) The Company shall be liable only . . . up to an amount not exceeding the amount stated in Item 3A of the Declarations as the result of any one occurrence.

* * *

(c) There is no limit to the number of occurrences during the policy period for which claims may be made, except that the company's total limit of liability arising out of the Products Hazard or the Completed Operations Hazard or both combined shall not exceed the amount stated in Item 3A of the Declarations as respects all occurrences during each annual period commencing with the effective or anniversary date of this policy.

American Home Policy, Section III (Insuring Agreements) (emphasis added).

The above language distinguishes between per-occurrence and aggregate limits. It provides for a single limit for each "occurrence" during the entire multi-year term, but separate

annual aggregate limits regardless of the number of occurrences that occur during each annual period. Accordingly, under the plain language of the Policy, there is only one occurrence limit of $10,000,000 potentially available under the American Home Policy for all of the asbestos claims filed against Greene Tweed.

The Limit of Liability section of the Allstate Policy, also unambiguously provides that Allstate shall be liable to pay, in excess of underlying policies, $15,000,000 for each occurrence and then separately provides that aggregate limits for all occurrences will be $15,000,000 "for each annual period during the currency of this policy." Allstate Policy ¶ 2 – Limit of Liability (Insuring Agreements). The Allstate Policy provides the following:

> It is expressly agreed that liability shall attach to the Company only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:
>
> (a) $10,000,000 ultimate net loss in respect of each occurrence, but
>
> (b) $10,000,000 in the aggregate for each annual period during the currency of this Policy separately in respect of Products Liability and separately in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employes [sic] of the Insured
>
> and the Company shall then be liable to pay only the excess thereof up to a further
>
> (c) $15,000,000 ultimate net loss in all in respect of each occurrence - subject to a limit of
>
> (d) $15,000,000 in the aggregate for each annual period during the currency of this policy, separately in respect of Products Liability and separately in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employes [sic] of the Insured.

Allstate Policy ¶ 2 – Limit of Liability (Insuring Agreements). As in the American Home Policy, the Allstate Policy's language distinguishes between per-occurrence and aggregate limits.

Accordingly, under the unambiguous terms of the Allstate Policy, there is only one occurrence limit of $15 million dollars potentially available thereunder for all the asbestos claims filed against Greene Tweed.

This conclusion is consistent with the decisions of other courts. See Gen. Refractories Co. v. Allstate Ins. Co., 1994 WL 246274, at *3 (E.D. Pa. June 8, 1994) (court rejected claim that insured was entitled to an annual occurrence limit under three year policy, finding that "the plain and unambiguous language of each [policy] establishes that only one per occurrence limit is available for any single occurrence during the [three-year] policy period"); Air Prods. & Chems. Inc. v. Hartford Accident & Indemn. Co., 1989 WL 73656, at *1 (E.D. Pa. June 30, 1989) (rejecting insured's argument that the per occurrence limits under a three-year policy applied separately for each year and finding only one per occurrence limit under the policy), aff'd in part and vacated in part on other grounds, 25 F.3d 177 (3d Cir. 1994). See also Westinghouse Elec. Corp., 2004 WL 1878764, at *33-34 (finding that language in three-year policy that was identical to the Allstate Policy was "unambiguous" and holding that the "policy clearly states that it is liable for only one per-occurrence limit per-policy period, not per year"); Chesapeake & Ohio Ry. Co. v. Certain Underwriters at Lloyd's London, 834 F. Supp. 456, 462-63 (D.D.C. 1993) ("per occurrence" limit in multi-year policies applied only once for each occurrence during multi-year period, not once per year, despite annual payment of premiums and annual aggregate limits on occupational disease claim), aff'd in part and rev'd in part on other grounds, 82 F.3d 478 (D.C. Cir. 1996).

D. Non-Cumulation of Liability Clause

Greene Tweed and American Home seek a ruling from the court as to whether the Non-Cumulation of Liability clause in the American Home Policy (the "Non-Cumulation Clause") reduces the limits of the Policy by the amount of insurance due from all previously issued excess policies covering the same loss. Greene Tweed seeks a declaration that the provision is invalid as an impermissible "escape clause."

The "Conditions" section of the American Home Policy contains the following "Prior Insurance and Non-Cumulation of Liability" Clause:

> It is agreed, that if any loss is also covered in whole or in part under any other excess policy issued to the insured prior to the inception date hereof, the company's limit of liability as stated in Item 3 of the Declarations shall be reduced by any amounts due the insured on account of any such loss under such prior insurance.

American Home Policy ¶ 3 (Conditions).[5]

American Home argues that the above Non-Cumulation Clause in its Policy prevents Greene Tweed from "stacking" successive excess insurance policies to respond to the same loss. Citing the Third Circuit's decision in Treesdale, American Home argues that this is not an "escape clause," but rather a valid anti-stacking provision.

In Treesdale, Liberty Mutual issued primary liability policies to Treesdale from May 1, 1975 to February 1, 1985. Each of the primary policies Liberty Mutual issued to

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[5] Allstate also claims that its policy contains a clause almost identical to the Non-Cumulation Clause. See May 14, 2004 letter to Judge Weiner. However, Greene Tweed disputes that the Allstate Policy issued to them contains such a clause. See N.T., 11/22/05, at 4-8. In view of this dispute, the parties agree that for purposes of deciding the cross-motions for summary judgment, the court can assume that the Allstate Policy did not contain a non-cumulation clause and therefore, should not decide what effect, if any, such a clause has on the extent of Allstate's obligations to Greene Tweed. Id. at 6-8.

Treesdale provided policy limits of $500,000 per occurrence, and in the aggregate for bodily injury. Treesdale, 418 F.3d at 332. Liberty Mutual also issued UEL coverage to Treesdale during the same period. Each of the UEL policies for the period May 1, 1975 to May 1, 1983 provided policy limits of $2,000,000 per occurrence and in the aggregate. The UEL policies for the period May 1, 1983 to February 1, 1985 provided policy limits of $5,000,000 per occurrence and in the aggregate. Id. The Limits of Liability section of each of the UEL policies contained the following non-cumulation of liability clause:

> Non-Cumulation of Liability - - Same Occurrence - - If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, each occurrence limit and the applicable aggregate limit or limits of the policy shall be reduced by the amount of each payment made by the company with respect to each occurrence, either under a previous policy or policies of which this policy is a replacement, or under this policy with respect to previous annual periods thereof.

Id. at 333. Liberty Mutual argued that the non-cumulation provision is intended to prevent stacking or cumulation of policy limits of its consecutive UEL policies that apply to the same occurrence. In other words, under this provision, if an occurrence had been covered by one policy in a line of successive policies issued by Liberty Mutual, then only one occurrence limit will apply. The highest liability Liberty Mutual had under any one UEL policy was $5,000,000. Liberty Mutual asserted that it already paid $5,000,000 in asbestos settlements and judgments on behalf of Treesdale under the UEL policies and, thus, it had no further duty to Treesdale. Id. at 339.

The Third Circuit first noted that the Pennsylvania courts had enforced similar anti-stacking provisions in automobile insurance policies. Id. at 340 n.14 (citing Bishop v.

Washington, 480 A.2d 1088 (Pa. Super. Ct. 1984); Equibank v. State Farm Mut. Auto. Ins. Co., 626 A.2d 1243 (Pa. Super. Ct. 1993)). The court then rejected Treesdale's argument that the non-cumulation provision was unenforceable because it was an escape clause. Id. at 343-44. The court explained that an escape clause is one that provides that there shall be no coverage where there is other valid and collectible insurance. Id. (citing Auto. Underwriters, Inc. v. Fireman's Fund. Ins. Co., 874 F.2d 188, 191 (3d Cir. 1989)). The Third Circuit said that "the Non-Cumulation provision, like all anti-stacking provisions, does not eliminate coverage," and therefore, was not an escape clause. Id. at 344. The court explained that the non-cumulation provision "simply provides that if a single occurrence gives rise to an injury during more that [sic] one policy period, only one occurrence limit will apply. The provision limits the dollar amount recoverable under the policies, but it does not eliminate coverage." Id. The court also relied upon Air Products, which held that a non-cumulation clause with the same language as the Treesdale case was not an invalid escape clause. Air Products, 1989 WL 73656, at *2.

Greene Tweed argues that Treesdale is inapposite to the American Home Policy because the language of the Non-Cumulation Clause is different. Greene Tweed points out that the operative word in the American Home provision is "loss," whereas the Treesdale clause uses the word "occurrence." The term "loss" is not defined in the American Home Policy. Greene Tweed argues that the term "loss" as used in the American Home Policy does not mean "occurrence" but rather refers "to the amount an insured has paid to a particular claimant, either in settlement of, or in response to an adverse judgment on, his claim and for which the insured seeks indemnification from its insurer." (Pl.'s. Resp. to Second Notice of Suppl. Auth. at 16.)

Greene Tweed's interpretation of the word "loss" was explicitly rejected by a federal district court which interpreted a non-cumulation clause nearly identical to the American Home clause. In California Insurance Co. v. Stimson Lumber Co., 2004 WL 1173185 (D.Or. May 26, 2004), National Union Fire Insurance Company ("National Union") issued successive excess liability insurance policies to Stimson Lumber Company ("Stimson"). Stimson sought coverage under the excess policies for numerous claims arising from Stimson's manufacture of an exterior hardwood siding product. The National Union policies contained the following "Prior Insurance Non-Cumulation of Liability Provision:"

> If a loss covered by this policy is also covered in whole or in part under any other excess policy issued to the Insured prior to the effective date of this policy, the limits of liability as stated in the declarations will be reduced by any amounts due to the Insured under such prior Insurance.

Id. at *10. Stimson argued that the term "loss" as used in the above provision "refers only to each individual siding claim paid for by Stimson and that no single claim will trigger application of the clause," because no single claim would exceed the $1 million limits of liability per occurrence. Id. at *11. The court in California Insurance found this interpretation to be "unreasonable within the meaning of the policy." Id. The court explained that although the term "loss" was not defined by the policy, it was not limited by any other language. The court noted that there was "no policy language that ties the term 'loss' to only individual occurrences." Id. Thus, the court held that "the term should be afforded its broadest meaning." Id. The court found support in its position because, as in the case of the American Home Policy, the National Union policies defined the "ultimate net loss" with several limitations or qualifiers, while the term "loss" was not limited. Id. Accordingly, the court concluded that the term "loss" should be

"interpreted to apply to the gross amount Stimson is seeking in its claim under the policy." Id. The court stated that "[t]o the extent that there is any excess insurance coverage available for the siding loss, the non-cumulation provision applies to reduce National Union's policy limits by the amounts paid in prior policy years as amounts paid by other excess settling insurers." Id.

The interpretation of the non-cumulation clause in California Insurance is consistent with two other decisions. See Westinghouse, 2004 WL 1878764, at *19 (finding nearly identical non-cumulation clause unambiguous under Pennsylvania law and implying that non-cumulation clause limited insurer's liability based on entire amounts paid by prior excess insurers for same occurrence); Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 494 (Del. 2001) (finding that nearly identical non-cumulation clause limits insurer's liability for environmental clean-up of polluted sites "based on amounts paid under earlier contracts"). The court will follow this interpretation of the Non-Cumulation Clause at issue here. Accordingly, this court finds that the only reasonable interpretation of "loss" as used in the American Home Non-Cumulation Clause is that the term means the gross amount Greene Tweed is seeking in its claim under the American Home Policy. Thus, to the extent the prior Hartford excess insurance policies provide payment for the asbestos claims against Greene Tweed, that also are covered by the American Home Policy, the Non-Cumulation Clause would apply to reduce the American Home Policy's limits by the total amounts paid, or due, to the insured from the prior excess insurers.

If this court were to consider only the Treesdale decision, this court would be inclined to find that the American Home Non-Cumulation Clause is not an escape clause because on its face the provision only purports to limit the dollar amount recoverable under the American

Home Policy, but it does not eliminate coverage. See Treesdale, 418 F.3d at 344. However, this court must address two prior decisions of the Third Circuit before it determines whether the American Home Non-Cumulation Clause is an escape clause.

In Insurance Co. of North America ("INA") v. Continental Casualty Co., 575 F.2d 1070 (3d Cir. 1978), the court addressed the validity of escape clauses under Pennsylvania law. In the INA case, a tractor-trailer owned by Rebel Truck Rentals, Inc., and leased to Tifton Aluminum Co., was involved in a fatal automobile accident. Continental Casualty issued a UEL policy to Rebel Truck, with a limit of $2 million. INA wrote a Blanket Liability Insurance policy covering Tifton Aluminum with coverage up to $8.5 million. Both policies provided coverage to the driver of the truck, the primary tortfeasor. However, each company contended that under the respective "other insurance" clauses, it was not responsible for the loss in question. Id. at 1071. The INA policy provided the following:

> If other collectible insurance with any other insurer is available to the insured covering a loss also covered hereunder (except insurance purchased to apply in excess of the limit of liability hereunder), the insurance hereunder shall be in excess of, and not contribute with, such other insurance.

Id. at 1071-72. A comparable clause in the Continental Casualty policy stated:

> If with respect to loss and ultimate net loss coverage hereunder, the insured has other insurance, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects loss and ultimate net loss; provided, that if the limit of liability of this policy is greater than the limit of liability provided by the other insurance, this policy shall afford excess insurance over and above such other insurance in an amount sufficient to give the insured, as respects the layer of coverage afforded by this policy, a total limit of liability equal to the limit of liability afforded by this policy.

Id.

The Third Circuit discussed the differences between an "excess clause" and an "escape clause." The court explained that "[a]n 'excess' clause purports to provide protection to the insured in addition to other coverage which might be available to him. Since it does not provide that supplemental protection until the other policy has been exhausted, it is 'excess' to the other coverage." Id. at 1072. In contrast, the court explained that "[a]n 'escape' clause provides that the company invoking it is relieved from any obligation to the insured if other coverage is available. Because the company may 'escape' responsibility under its policy if that clause is given effect, not unexpectedly, 'escape' clauses are generally in disfavor with the courts." Id.

The Third Circuit labeled the INA clause an excess clause. However, the court found that the "first part of the Continental language is of the 'escape' variety," because "[t]he Company claims to grant no coverage if the insured has other protection." Id. The court noted that the second part of the clause following "provided," "is not so draconian." The court found that the Continental policy will provide excess coverage, "but only if the limits of its policy are greater than the 'other insurance' available, and not otherwise." Id. Nonetheless, the court held that "in the context of the dispute at bar" the clause "must be labeled 'escape.'" Id. This was because "[a]s applied to the facts," "the second part of the clause excludes all coverage because Continental's $2 million limit is not greater than INA's $8.5 million." Id. Because the Continental provision was an escape clause, the court refused to enforce the clause and entered judgment in favor of INA. Id. at 1073-74.

In Automobile Underwriters, Inc. v. Fireman's Fund Insurance Cos., 874 F.2d 188 (3d Cir. 1989), the court struck an "other insurance" clause contained in an insurance policy as an

unenforceable "escape clause" under Pennsylvania law. In that case, a customer left his automobile for repairs at a Ford dealership. The dealership leased the customer a car to use until the repairs on the car were completed. While driving the leased car, the customer struck and killed a pedestrian. The pedestrian's estate brought a wrongful death action against the customer. The customer had a policy with Automobile Underwriters, Inc. The limit of liability of the policy was $35,000. The policy contained a provision which stated:

> If there is any other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Id. at 189. The dealership was covered by a primary policy issued by Fireman's Fund Insurance Companies ("Fireman's Fund") which had a limit of $1,000,000. The Fireman's Fund policy stated:

> Anyone else is an insured while using with your permission a covered auto except: . . . (3) your garage operations customers. However, if a garage operations customer of yours . . . (a) Has no other available insurance (whether primary, excess or contingent), he or she is an insured only up to the compulsory or financial responsibility law limits where the covered auto is principally garaged. (b) Has other available insurance (whether primary, excess or contingent), less than the compulsory or financial responsibility law limits where the covered auto is principally garaged, he or she is an insured only for the amount by which the compulsory or financial responsibility law limits exceeds the limits of his or her other insurance.

Id. at 189-90. Automobile Underwriters brought a declaratory judgment action against Fireman's Fund and contended that its policy provided only excess coverage to that undertaken by Fireman's Fund. The district court held that the clause in the Fireman's Fund policy was an "excess clause," and not an unenforceable "escape clause," because "it insured against the possibility that the driver did not carry insurance or carried insurance below the minimum

required by Pennsylvania law." Id. at 190. The lower court found that because the customer had other insurance which exceeded the statutory minimum required by Pennsylvania, the customer was not an insured under the Fireman's Fund policy. Id. The Third Circuit reversed the lower court and struck the Fireman's Fund "other insurance clause" as an "escape clause." The Court stated the following:

> Fireman's Fund confuses the distinction between an excess clause and an escape clause. An excess clause provides for payment of that portion of the claim that remains unpaid once other coverage is exhausted. Id.; see also INA 575 F.2d at 1072. An escape clause, on the other hand, relieves the insurer from any obligation to its insured if other coverage is available. Id.
>
> The district court here reasoned that the Fireman's Fund clause was not an escape clause because it would not exonerate the company from liability with respect to a class of potential insureds, i.e., those without the minimum coverage required under law. Such a construction is inconsistent with our analysis in INA. There, we refused to view the clause in a hypothetical situation and instead construed the clause "[a]s applied to the facts here" and labeled it "escape" "in the context of the dispute at bar." 575 F.2d at 1072. No escape clause exonerates the company from liability in *all* situations; all such clauses by definition contemplate the possibility that no other insurance policy will provide coverage, but it is only in the event of that contingency that the insurer will be responsible.
>
> The policy reason for nullifying escape clauses was discussed in INA where we noted that such a rule protects the interests of the insured; that companies who write insurance in the state are aware of the rule; and that applying it would promote certainty in a field of law where predictability was particularly desirable. 575 F.2d at 1074.

Id. at 192-93.

Applying the INA and Automobile Underwriters cases to the facts of the dispute between Greene Tweed and American Home, the court concludes that the American Home Non-Cumulation Clause is an unenforceable escape clause. Greene Tweed urges that because it is faced with over 60,000 lawsuits alleging personal injury from asbestos exposure and because its

primary coverages are nearly exhausted, it surely will exhaust all the Hartford excess policies issued prior to December 31, 1973, when the American Home Policy became effective. American Home does not dispute this prediction, and for purposes of deciding the pending motions, the court assumes this prophecy will occur.[6] At the time when the pre-1974 Hartford excess coverages are exhausted, American Home will be asked to indemnify the remaining asbestos-related claims against Greene Tweed. At that point, should American Home be permitted to invoke its Non-Cumulation Clause, the effect will be to allow American Home to provide no coverage at all to Greene Tweed, because its $10 million limit of liability does not exceed the limits of liability of the prior Hartford excess policies, including the $10 million Hartford excess policy that the American Home Policy immediately replaced. Assuming under J.H. France's multiple trigger theory that the losses in the amount of $10 million covered under the prior Hartford excess policies also are covered under the American Home Policy, American Home would escape coverage entirely. No money would be paid by American Home under the policy.[7] Pursuant to the decisions in INA and Automobile Underwriters, this is impermissible,

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[6] The Declaratory Judgment Act requires "a case of actual controversy." 28 U.S.C. § 2201. The court can enter a declaratory judgment "even though there are future contingencies that will determine whether a controversy ever actually becomes real." 10B Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2757 at 476 (1998). In determining whether an actual controversy exists, the court should consider "the practical likelihood that the contingencies will occur." Id. at 477. Given the fact that Greene Tweed faces over 60,000 asbestos lawsuits and the number continues to grow, it is almost certain that coverage under the American Home UEL Policy will be triggered and thus, the issue of the effect of the Non-Cumulation Clause is an actual controversy.

[7] Another possible consequence of upholding the American Home Non-Cumulation Clause may be that Allstate will claim that it is not obligated to pay Greene Tweed under its $15 million Allstate UEL Policy, which is in excess of the American Home Policy. Under the Allstate Policy, "liability shall attach to the Company only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net

even though the language of the American Home Non-Cumulation Clause does not purport to eliminate coverage, but only reduce coverage, and that "in a hypothetical situation," there may be circumstances where the American Home's Non-Cumulation Clause would not bar coverage. See Auto. Underwriters, 874 F.2d at 193. Under INA and Automobile Underwriters, the court must construe the clause "[a]s applied to the facts here." Id. Under the undisputed facts here, the American Home Non-Cumulation Clause is an invalid escape clause that cannot be enforced under Pennsylvania law.

The Treesdale opinion made no attempt to distinguish its facts from the Third Circuit's prior decisions in INA and Automobile Underwriters. Indeed, Treesdale did not even cite the INA case. The Automobile Underwriters case was cited in Treesdale only for the definition of an escape clause; the court did not discuss the facts of the case. Specifically, the Third Circuit in Treesdale did not discuss its previous ruling that a court must apply an "other insurance" clause to the facts of the case to determine whether the clause is an "escape." It is not

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loss liability," i.e., $10 million per occurrence (Allstate Policy ¶ 2 (Insuring Agreements.)) When the limits of liability provision of an excess insurance contract provide coverage in excess of applicable underlying insurance, most courts have held that the excess insurance contract does not "drop down." See Scott M. Seaman and Charlene Kittredge, Excess Liability Insurance Law and Litigation, 32 Tort & Ins. L.J. 653, 670 (1997)(collecting cases). "A 'drop down' coverage dispute arises when an excess liability insurance carrier disputes its duty to 'drop down' in order to provide coverage below the primary insurer's policy limits. Such disputes are common when the primary insurer becomes insolvent." Lexington Ins. Co. v. Western Pennsylvania Hosp., 423 F.3d 318, 324 n.3 (3d Cir. 2005). See also Koppers, 98 F.3d at 1454 (In Pennsylvania, "a true excess or secondary policy is not 'triggered' or required to pay until the underlying primary coverage has been exhausted"); Chester Carriers, Inc. v. Nat'l Union Fire Ins. Co., 767 A.2d 555, 563 (Pa. Super. Ct. 2001)(umbrella policy not required to pay out until limits of underlying policies have been exhausted).

enough to uphold the clause merely because the language does not explicitly eliminate coverage.[8] Auto. Underwriters, 874 F.2d at 193.

As noted above, Treesdale relied primarily upon the district court's opinion in Air Products and, to a lesser extent, upon two decisions of the Pennsylvania Superior Court which upheld anti-stacking provisions in automobile cases. See Equibank v. State Farm Mut. Auto. Ins. Co., 626 A.2d 1243 (Pa. Super. Ct. 1993), appeal denied, 639 A.2d 28 (Pa. 1994); Bishop v. Washington, 480 A.2d 1088 (Pa. Super. Ct. 1984). Like Treesdale, Air Products and the two Superior Court decisions concern non-cumulation or "other insurances" clauses that appear in multiple policies issued by the same insurer that cover the same loss. For this reason, Treesdale, and the decisions it relied upon, are distinguishable from the instant case.

In Air Products, the Liberty Mutual Insurance Company's ("Liberty") non-cumulation clause provided that Liberty was entitled to reduce the occurrence limit of a particular policy "by the amount of payment made by the company with respect to such occurrence, whether under its previous policy or policies of which this policy is a replacement, or under this policy with respect to annual periods thereof." 1989 WL 73656, at *1. The court distinguished this clause from that at issue in the Third Circuit's INA case. The court noted that "INA concerned the application of 'other insurance' clauses in the contracts of two insurers, INA and Continental, which covered the same loss." Id. at *2. The court noted that in its case the non-cumulation clause was not an escape clause, because the provision only sought "to limit, rather

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[8] The Second Circuit, in a decision applying Pennsylvania law, emphasized that the Third Circuit in INA required that when determining whether an "other insurance clause" is an escape clause, a court must consider the effect of the clause as applied to the facts of the case and in the context of the dispute. See Inst. for Shipboard Educ. v. Cigna Worldwide Ins. Co., 22 F.3d 414, 422 (2d Cir. 1994).

than preclude, Liberty's liability for claims against its insured." Id. In other words, even after the application of the non-cumulation clause, Liberty would still have to indemnify the insured "under its previous policy or policies of which this policy is a replacement, or under this policy with respect to annual periods thereof." Id. at *1.

In Bishop, the insured struck an automobile while driving a bus owned by his church. The passenger in the automobile died as a result of the accident. At the time of the accident, the insured was the owner of an automobile and a truck. Both of these vehicles were insured by Nationwide Insurance Company under separate, but identical, policies. Both of the policies provided liability coverage for the accident because the insured was involved in an accident while driving a "non-owned" motor vehicle. Liability for coverage for bodily injury under each policy was limited to $25,000 per person. Bishop, 480 A.2d at 1089. The policies also included an "other insurance" provision, which stated, in pertinent part:

> For losses involving the use of other motor vehicles, we will pay the insured loss not covered by other insurance. If Property Damage or Bodily Injury Liability covered in more than one policy applies to a loss, we will pay only up to the highest limit in any one policy.

Id. at 1089-90.

After the insurer for the church settled with the administrators of the decedent's estate, the administrators then demanded $50,000 from Nationwide under both policies it issued to the insured for his car and truck. Nationwide paid $25,000 to the administrators under the terms of one policy, but refused to pay an additional $25,000 under the second policy. Nationwide maintained that pursuant to the "other insurance" provision, it was only liable for the highest coverage limit in any one policy. Id. at 1090. The Pennsylvania Superior Court upheld

Nationwide's interpretation of its obligation under the two policies. After first finding that the "other insurance" provision was clear and unambiguous, the court rejected the argument that the provision was unconscionable. Id. at 1093-94. The court noted that the Nationwide policies "do not exclude all recovery for losses such as the one involved in this case." Id. at 1095 (emphasis in original). Rather, the company confined its loss "to the highest limit in any one policy ($25,000)." Id. Moreover, the court noted that even though the insured paid two different premiums for the two policies, he received separate coverage for two distinct risks, one for his car and one for his truck. Id.

In Equibank, the insured had two policies with State Farm Insurance Company for two automobiles he owned. While driving an automobile owned by another person, the insured struck an automobile and the driver in that vehicle was seriously injured. The owner of the vehicle that was driven by the insured at the time of the accident also had an insurance policy with State Farm with a limit of $100,000. State Farm paid this amount to the injured driver. State Farm also had issued a policy to the insured's daughter for $100,000, which also provided coverage for relatives who resided with the insured who were involved in an automobile accident. State Farm paid the limits of that policy to the injured party. Equibank, 626 A.2d at 1244.

State Farm also agreed to pay the $100,000 limit on one of the two policies issued to the insured, but refused to do so under the other policy. State Farm denied that it had an obligation to indemnify under the other policy based upon the following anti-stacking provision: "Policies Issued by Us to You. If two or more vehicle liability policies issued by us to you apply to the same accident, the total limits of liability under all such policies shall not exceed that of

the policy with the highest limit of liability." Id. Relying on its previous decision in Bishop, the Superior Court in Equibank found that the State Farm anti-stacking provision was clear and unambiguous and was valid under Pennsylvania law. Id. at 1246-47. The court, therefore, entered judgment in favor of State Farm.

The Treesdale, Air Products, Bishop and Equibank opinions provide that an anti-stacking provision is valid so long as the insurer invoking the provision will be required to indemnify the insured pursuant to either the policy containing the provision or other policies it issued to the insured.[9] In the present case, American Home would not be required to pay anything to Greene Tweed should the court enforce the non-cumulation clause. Thus, this case is distinguishable from Treesdale and is akin to the facts in the INA and Automobile Underwriters decisions. Accordingly, for all the above reasons, the court finds that under the undisputed facts that are predicted to occur as the 60,000 asbestos claims proceed against Greene Tweed, the Non-Cumulation Clause in the American Home Policy is an unenforceable escape clause under Pennsylvania law. An appropriate order follows.

BY THE COURT:

\s\ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

[9] But see UTI Corp. v. Fireman's Fund Ins. Co., 896 F. Supp. 362, 377-79 (D.N.J. 1995) (citing Automobile Underwriters, the court found that an "other insurance clause" was an invalid escape clause under Pennsylvania law even though the company invoking the clause "will pay under another policy it issued to the insured for a claim").

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

GREENE, TWEED & CO., INC.	:	CIVIL ACTION
v.	:	
HARTFORD ACCIDENT & INDEMNITY CO., et al.	:	NO. 03-3637

O R D E R

AND NOW, this 21st day of April, 2006, for the reasons set forth in the Memorandum of Decision filed this date, it is hereby

ORDERED

1. Plaintiff's Motion for Partial Summary Judgment Against defendant American Home Assurance Company ("American Home") and Allstate Insurance Company ("Allstate") (Doc. No. 51) is DENIED IN PART and GRANTED IN PART. The Motion is DENIED on the issue of number of occurrences and GRANTED as to the issue of American Home Policy's Non-Cumulation Clause; and

2. American Home's Motion for Partial Summary Judgment (Doc. No. 53), to which defendant Allstate joins, is GRANTED IN PART and DENIED IN PART. The Motion is GRANTED on the issue of the number of occurrences but DENIED on the issue of American Home Policy's Non-Cumulation Clause.

BY THE COURT:

\s\ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge