

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

GENERAL ACCIDENT INSURANCE	:	
COMPANY OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-3869
THE AMERICAN INSURANCE	:	
COMPANY	:	
	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

January 27, 2000

Plaintiff General Accident Insurance Company of America, Inc. (“General”) instituted this Declaratory Judgment Action seeking a determination that Defendant, The American Insurance Company (“American”), is obligated to contribute its proportionate share of defense costs to General in connection with a series of law suits initiated against the law firm of Blank, Rome, Comisky & McCauley and certain of its partners (“Blank Rome”). Currently before the Court is General Accident’s Motion for Summary Judgment as to Liability and American’s Cross-Motion for Summary Judgment. For the reasons stated below, the Motion of General is Denied and the Motion of American is Granted.

## **I. BACKGROUND**

General issued a primary lawyers professional liability policy to Blank Rome with policy limits of \$10,000,000 per claim and in the aggregate, effective April 8, 1984 to April 8, 1985 (the “Primary Policy”). First layer excess liability coverage was provided by Lexington Insurance Company (“Lexington”) with policy limits of \$15,000,000 per claim and in the aggregate. Defendant American issued second layer excess coverage along with International Surplus Lines Insurance Company (“ISLIC”) and Safety Mutual Casualty Company (now known as “Safety National”). The American Policy had limits of \$10,000,000 per claim and \$25,000,000 in the aggregate. All of the excess policies were in effect from April 8, 1994 to April 8, 1995.

Claims were made and lawsuits were commenced against Blank Rome in connection with its representations of and the services it performed for Sunrise Savings and Loan Association (the “Sunrise Litigation”). Blank Rome sought coverage under both its Primary Policy and its excess policies, including the American Policy. General provided Blank Rome’s defense during the Sunrise Litigation. By an agreement dated July 28, 1988 (the “1988 Release”), Blank Rome’s insurers, including both General and American, agreed to pay their respective limits in settlement of the Sunrise litigation. Each of the insurers tendered an amount equal to the limits of their policy to Blank Rome which in exchange, released each insurer from any further obligations under their policies with regard to claims arising out of the Sunrise Litigation. Subsequently, General sought reimbursement from the four excess carriers for their pro rata share of the \$5.5 million in Blank Rome defense costs that General expended during the Sunrise Litigation. General claimed that the express provisions of the policy issued to Blank

Rome called for pro rata contribution among the firm's liability insurance providers. On June 18, 1992, three of the excess insurance carriers entered into an agreement which, according to General, had the effect of tolling the statute of limitations and called for the parties to "explore the potential for a resolution of General's claims without resort to litigation (the "Tolling Agreement"). General and American were not able to resolve their differences through alternative dispute resolution. Accordingly, this Complaint was filed on July 30, 1999.

Safety National, which accounted for 10% of the total Blank Rome insurance obligation, refused to enter into the Tolling Agreement. As a result, General initiated an action against Safety National in July, 1992. On cross-motions for summary judgment, the district court judge found in favor of General. Eventually General and Safety National settled their dispute and the case was dismissed.

## **II. LEGAL STANDARD**

Under Federal Rule of Civil Procedure 56(c), that test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir.1992). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Movant "bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact".

Celotex, 477 U.S. at 323. When movants do not bear the burden of persuasion at trial, they need only point to the court “that there is an absence of evidence to support the nonmoving party’s case. Id. at 325. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). For the dispute over the material fact to be genuine, “the evidence must be such that a reasonable jury could return a verdict in favor of the non-moving party.” Id.

### **III. DISCUSSION**

General argues the American Policy’s provisions obligate American to share the costs of defending a suit against the firm once the limits of the Primary Policy have been exceeded. American argues first that it is not liable as the provisions of the American Policy do not expressly obligate it to pay for defense costs. It also argues that the conditions under which the policy requires it to share defense costs have not been met. Finally, American claims that since it has already paid to Blank Rome the amount of its policy limit, it has no further obligation to General or Blank Rome.

#### **A. The Policies**

I. General Accident’s Primary Policy requires:

(a) the Company will defend any claim made against the Insured brought anywhere in the world provided that coverage is afforded by the policy even if the allegations of the complaint are groundless, false or fraudulent.

(b) In addition to the applicable limit of liability, the Company will pay all claim expenses incurred in the defense of the Insured provided that the Company will not be obligated to pay any claim or to defend or continue to defend any claim after the limit of liability has been exhausted by the payment of judgments or settlements.

Apportionment of Claims Expenses:

In the event payment for damages by the Insured, any other carrier on behalf of the insured and the Company is in excess of the amount of the limits available under this Policy, the Company shall be obligated to pay that proportion of claim expenses as the amount of damages paid by Company bears to the total amount of damages.

Claim Expenses are defined as

(a) Fees and disbursements charged by any lawyer mutually agreed upon in writing by the Company and the Insured and ;

(b) The costs of any bond or appeal of an adverse judgment; but the Company shall have the obligation to apply for or furnish such bond;

(c) All other costs and expenses resulting from the investigation, adjustment, defense and appeal of a claim if incurred by the Company.

Claim expenses do not include salary charges of regular employees or officials of the Company, of supervisory counsel retained by the Company or of any insured. The determination of the Company as to the reasonableness of the claim expenses shall be conclusive to the Named Insured.

II. The American Excess Liability Policy obligated American to

“Pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages on account of breach of professional duty arising out of the hazards covered by and defined in the primary policy or policies specified in the declaration page as primary insurance and issued by the primary insurer or insurers indicated.

The policy is subject to the same warranties, terms (including the terms used to describe the application of the limits of liability), and exclusions as are contained in the primary insurance on the effective date of this policy, *except*, unless otherwise specifically provided in this policy, any such warranties, terms, conditions and exclusions relating to the following:

- (a) premium
- (b) the obligation to investigate and defend
- (c) the amount and limits of liability
- (d) any renewal agreement.

**B. The Safety National Case**

General previously brought suit against one of the other second-level excess insurance carriers, Safety National, for reimbursement of costs it incurred while defending Blank Rome in the Sunrise Litigation. See General Accident Ins. Co. of America v. Safety National Casualty Corporation (GA I), 825 F. Supp. 705 (E.D. Pa. 1993). Judge Padova found, on cross-motions for summary judgment, that Safety National, had an equitable duty to contribute on a pro rata basis toward the cost of defending Blank Rome. The claims made by General rested upon its assertions that (1) the primary and excess policies had been exhausted, (2) Safety National's Policy expressly states that liability attaches in that event and (3) Safety National's policy incorporates a duty to defend and a clause apportioning defense costs on a pro rata basis, without regard to when the defense costs were incurred. Id. at 710.

The District Court held that since the Safety National Policy was silent on the issue of defense costs, it thereby followed form as to the terms of the primary General Policy with regard to defense costs. The terms of the primary General Policy incorporated by the Safety National Policy apportioned defense costs on a pro rata basis in the event the loss was in excess of the amount available under the terms of the primary General Policy. Id. at 712. Therefore, Judge Padova found that Safety National's Policy contained clear language demonstrating its intent to participate on a pro rata basis in the defense of Blank Rome in the event General's policy limits were exhausted. Since all parties agreed that the limits of the primary General Policy had been exceeded, Safety National had an equitable duty to contribute pro rata to the defense costs incurred by General.

### C. American's Obligations to Contribute to General

The relationship as between several insurers, who have covered the same risk do not arise out of contract, but are based upon equitable principles designed to accomplish ultimate justice in bearing a specific burden. See GA I, 825 F.Supp. at 707; Guaranty Nat'l Ins. Co. v. American Motorists Ins. Co., 758 F.Supp. 1394, 1397 (D. Mont. 1991) (recognizing a growing trend toward using equity to govern relations between insurers who cover the same risk). The equitable considerations that apply in a given case depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers. See GA I, 825 F.Supp. at 707. With these considerations in mind, the Court turns to the arguments presented by the parties.

American first argues that it has no obligation to reimburse General because it has not incorporated the General Policy's provisions for apportioning "defense" claim expenses. The language of the American Policy is clear that its obligation to defend and investigate does not follow the form provisions found within the General Policy.<sup>1</sup> That section of the policy which American relies upon demonstrates only that it does not have the same obligation to investigate and defend Blank Rome as would General Accident in connection with a claim against the firm. The obligation to defend, however, is not in dispute as General admits that to do so was its

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1. The policy is subject to the same warranties, terms (including the terms used to describe the application of the limits of liability) and exclusions as are contained in the primary insurance on the effective date of this policy, *except*, unless otherwise specifically provided in this policy, any such warranties, terms, conditions and exclusions relating to the following:

- (a) premium
- (b) the obligation to investigate and defend
- (c) the amount and limits of liability
- (d) any renewal agreement.

responsibility as the primary liability insurer.<sup>2</sup> However, that does not necessarily preclude American from paying a pro rata share of the costs of defense. The costs incurred while defending the Sunrise Litigation on behalf of Blank Rome would first be General's responsibility. However, since General has already paid the limit of its liability according to the terms of the release dated July, 1988, it looks to other parties for contribution.<sup>3</sup> The Primary Policy allows General to seek pro rata contribution of claim expenses paid in excess of the limit of liability. Since the costs of defending Blank Rome falls under the definition of a claim expense, General would be authorized to seek contribution from American unless American's policy expressly denies contributing to costs for defense of the Insured.

When a provision of an insurance policy is clear and unambiguous, a court is required to give effect to that language. See Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563 (1983). In order to determine whether a term is ambiguous, the term or language must be considered in the context of the entire policy. See Riccio v. American Republic Ins. Co., 453 Pa. Super. 364, 683 A.2d 1226 (1996). It is well-settled law in

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2. The General Policy provides that (a) the Company (General) will defend any claim made against the Insured brought anywhere in the world provided that coverage is afforded by the policy even if the allegations of the complaint are groundless, false or fraudulent.

3. (b) In addition to the applicable limit of liability, the Company will pay all claim expenses incurred in the defense of the Insured provided that the Company will not be obligated to pay any claim or to defend or continue to defend any claim after the limit of liability has been exhausted by the payment of judgments or settlements.

#### Apportionment of Claims Expenses

In the event payment for damages by the Insured, any other carrier on behalf of the Insured and the Company is in excess of the amount of the limits available under this Policy, the Company shall be obligated to pay that proportion of claim expenses as the amount of damages paid by Company bears to the total amount of damages.

Pennsylvania that exclusions to an insurer's general liability are narrowly construed against the insurer. Pecorara v. Erie Ins. Exchange, 408 Pa. Super. 153, 156, 596 A.2d 237, 239 (1991). If an ambiguity exists as to an exclusion provision, the language is to be strictly construed against the insurer. Id.; See also Reliance Ins. Co. v. Moessner, 121 F.3d 985 (3d Cir. 1997)

(Pennsylvania Courts have routinely applied the principle that ambiguities are construed against the drafter in disputes between insurance professionals). In this case, it is far from clear that the obligation to pay defense costs would be exempted by the provision of the American Policy excluding its obligation to investigate and defend from the form provisions of the General Policy. Since ambiguities are construed against the insurer, the Court finds that American can not rely solely on that provision to avoid paying contribution.

American also argues that it is not obligated to contribute because the costs sought by General were incurred before the Primary Policy's limits were exhausted. Here the Court is guided by the well reasoned opinion of the Judge Padova in GA I. In that case, Safety National contended that it was not responsible for costs incurred prior to liability attaching. The Court disagreed, finding that once liability attached, the excess insurer could be held liable on a pro-rata basis for all costs, including those costs incurred before liability attached. See, GA I, 825 F.Supp. at 708-709; Builders Transport, Inc. v. Ford Motor Co., 25 F. Supp. 2d 739 (E.D. Tex. 1998) ( Under Pennsylvania law, excess insurer was liable for proportionate pro rata share of defense costs, including those incurred before underlying coverages were exhausted). The American Policy does not limit its obligation once liability attaches (which like Safety National's does so only after the Primary insurer's limits have been exhausted) to costs incurred after

general liability attaches. Therefore, American is not exempt from paying contribution by the clause which calls for liability only upon the exhaustion of General's limits.

American's third argument is that although it may be obligated in certain instances to pay pro rata defense costs, the conditions for it doing so are not met under the facts of this case. Legal expenses arising from the defense of Blank Rome would qualify as costs under the American Policy.<sup>4</sup> American is obligated to contribute pro rata "Costs" when a claim is terminated by settlement or judgment for an amount in excess of the primary limits, but only when those costs are incurred personally by the insured with the written consent of American. Therefore, the court must decide whether this language in the American Policy excludes it from contributing to the costs incurred by General. The Court recognizes that General has established that the limits of the Primary Policy and the excess policies were exceeded under the terms of the 1988 Release. The next question is whether the language of "costs personally incurred by the Insured with the written consent of the Company (American)" will overcome the imposition of liability for the defense costs.

Since there is no evidence presented showing that defense costs in excess of the respective policy limits were either personally incurred by Blank Rome, or more importantly, expended with the written consent of American, it appears that the contractual language prevents General from receiving pro-rata contribution from American. General argues that the language of the American Policy should not be given effect because the respective obligations between insurers covering the same risk are governed by equitable considerations and not contract principles. See GAI, 825 F.Supp. at 707. However, the equitable considerations that apply in a

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4. "Costs" under the American Policy include interest on judgments, investigation, adjustment and legal expenses.

given case depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers. See Id. Therefore, the Court can not ignore the language of this clause. The California Supreme Court has held that an excess insurer was not obligated to contribute to defense costs when the excess policy provided that the duty to contribute to costs would arise only if the insured obtained the excess carrier's written consent to incur costs . See Signal Companies v. Harbor Ins. Co., 27 Cal. 3d 359, 612 P.2d 889, 894 (1980). Judge Padova, in reaching the opposite conclusion in GAI, distinguished Signal by showing that the Safety National Policy did not contain a clause expressly limiting the duty to investigate and defend to circumstances where the excess insurer had given its express consent to a continuation of proceedings. 825 F.Supp. at 710. The Court does not find that Judge Padova's opinion in GAI ignored the unambiguous language of a Policy on equitable grounds. It merely followed established patterns of resolving ambiguities against the drafter of the policy, Safety National. Equity does not require this Court to impose an obligation on American which it did not commit itself to at the time of the Policy's issuance. Therefore, summary judgment will be granted to American.

#### **IV. CONCLUSION**

For the reasons stated above, summary judgment is awarded to Defendant American and against Plaintiff General.

An appropriate Order follows.

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Plaintiff,	:	
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v.	:	
	:	NO. 99-3869
THE AMERICAN INSURANCE	:	
COMPANY	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 27th day of January, 2000, upon consideration of Plaintiff's Motion for Summary Judgment (Docket No. 12), and the Defendant's Response thereto (Docket No. 16 & 17), as well as Defendant's Cross-Motion for Summary Judgment (Docket No. 15) and Plaintiff's Response (Docket No. 21); it is hereby **ORDERED** that the Plaintiff's Motion is **DENIED** and the Defendant's Cross-Motion is **GRANTED**.

Judgment is entered in favor of the defendant, The American Insurance Company, and against the plaintiff, General Accident Insurance Company of America.

This case shall be marked **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.