Not Reported in A.3d, 2012 WL 952251 (N.J.Super.A.D.)
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
In the Matter of the Liquidation of INTEGRITY INSURANCE COMPANY/JOHN CRANE, INC.

Argued Feb. 28, 2012.
Decided March 22, 2012.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C–63–03.
Edward B. Mueller (Nisen & Elliott, L.L.C.) of the Illinois bar, admitted pro hac vice, argued the cause for appellant John Crane, Inc. (Margolis Edelstein and Mr. Mueller, attorneys; Jeanine D. Clark, on the brief).

David M. Freeman argued the cause for respondent Thomas B. Considine, Commissioner of Banking and Insurance of the State of New Jersey in his capacity as Liquidator of Integrity Insurance Company (Mazie Slater Katz & Freeman, L.L.C., attorneys; Mr. Freeman, of counsel and on the brief, John D. Gagnon, on the brief).

Before Judges PAYNE, REISNER and ACCURSO.

PER CURIAM.

***1** John Crane, Inc. (JCI), a Delaware corporation with its principal place of business in Illinois, was, until approximately twenty-five years ago, engaged in the business of manufacturing industrial packings and gaskets containing asbestos. As a result, commencing in 1979, it was named as a defendant in multiple lawsuits resulting in the payment of $350,000,000 for defense and indemnification as of June 30, 2009.

JCI was covered by policies of excess liability insurance from January 1, 1958 to December 31, 1985. During the policy period of November 30, 1982 to November 30, 1983, JCI was insured by Integrity Insurance Company under a third-level excess liability insurance policy number XL 206904 in the amount of $3,000,000. Underlying that coverage was primary insurance issued by Lumbermens Mutual Insurance Company with occurrence limits of $250,000; umbrella/first-level excess coverage issued by Integrity with limits of $2,000,000; and second-level excess coverage issued by Twin City Fire Insurance Company with limits of $5,000,000. In total, Integrity issued nine policies of liability insurance to JCI covering various policy periods at differing levels.

In 1987, Integrity, a New Jersey insurer, was declared insolvent and placed in liquidation. During the course of the liquidation proceedings, JCI filed proofs of claim in connection with four Integrity policies, seeking recovery pursuant to the "pro rata" coverage allocation principles established by the New Jersey Supreme Court in *Carter–Wallace, Inc. v. Admiral Insurance Co.*, 154 *N.J.* 312 (1998). The Liquidator allowed claims in connection with three of those policies in the total amount of $7,558,696.30. The Liquidator denied JCI's claim on policy XL 206904, seeking $1,086,408 in defense costs, filed on June 29, 2009, one day before the claim bar date, on the ground that JCI had failed to demonstrate exhaustion of the underlying coverage issued by Twin City. FN1 In that connection, JCI took the position that the Twin City policy covered defense costs within its policy limits thereby exhausting the $5,000,000 in coverage provided by the policy, whereas the Liquidator claimed that coverage of defense costs was in addition to policy limits, and thus untapped coverage in the amount of $2,364,471 remained.

FN1. The parties have not included the Liquidator's Notice of Decision in the record on appeal. Therefore, we are unable to

confirm the precise basis for that decision.

Following issuance by the Liquidator of the Notice of Decision denying JCI's claim, JCI requested a hearing before the Special Master appointed to resolve disputes arising from the Integrity liquidation proceedings. In briefing submitted to the Special Master, JCI argued that the Liquidator's construction of the terms of the Twin City policy was incorrect. Additionally, JCI argued for the first time that the Liquidator should have applied Illinois law and thus evaluated its claim under the "all sums" approach recognized by the Illinois Supreme Court in *Zurich Insurance Co. v. Raymark Industries, Inc.*, 514 *N.E.*2d 150 (Ill.1987).

Under the "pro rata" approach adopted in *Carter–Wallace*, allocation of insurance coverage among carriers whose coverage is triggered takes into consideration both the insurer's time on the risk and the degree of risk that it has assumed. Thus, allocation occurs " 'in proportion to the degree of the risks transferred or retained during the years of exposure' " to the toxic substance at issue. *Carter–Wallace, supra,* 154 *N.J.* at 327 (quoting *Owens–Illinois, Inc. v. United Ins. Co.*, 138 *N.J.* 437, 475 (1994)).

***2** In contrast, *Raymark Industries* rejects a "pro rata" allocation as inconsistent with policy language requiring the insurer to pay "all sums which [the insured] shall become legally obligated to pay as damages because of ... bodily injury ... caused by an occurrence." *Raymark Indus., supra,* 514 *N.E.*2d at 165. Under the "all sums" or "joint-and-several" approach adopted by the *Raymark Industries* Court, "each carrier whose policy is triggered is jointly and severally liable for the total indemnity and defense costs of a claim without proration." *Ibid.* We have observed:

> The principal differences between the two approaches are (1) under a pro rata approach, the insured bears the risk of loss in periods in which no insurance was in force, whereas under the joint-and-several approach, the insured bears no risk until coverage is wholly exhausted, and (2) under a pro rata approach, the coverage obligations of triggered carriers are determined at the outset, whereas under a joint-and-several approach, a designated triggered carrier can spread the risk only by paying the claim and then seeking contribution from other triggered carriers.
>
> [*Century Indem. Co. v. Mine Safety Appliances Co.*, 398 *N.J.Super.* 422, 429 (App.Div.2008).]

The Special Master rejected JCI's arguments in a written opinion in which he upheld the Liquidator's construction of the Twin City policy to provide for defense costs in addition to occurrence limits, and he rejected the application of Illinois law to the allocation issue, determining that New Jersey had a greater interest in the allocation issue that JCI raised. Upon further appeal, the decision of the Special Master was affirmed in the Law Division. FN2

> FN2. The matter has a Chancery Division docket number, but was heard by a Law Division judge.

In the present appeal, JCI presents the same arguments that it offered previously, again contending that the Liquidator misconstrued the terms of the coverage offered by Twin City, recognizing that the policy at issue affords coverage for defense costs but arguing that such costs are included in "ultimate net loss" as defined in the policy. It argues additionally that, as the result of the applicability of Illinois law, the matter should be recommitted to the Special Master pursuant to *Rule* 4:41–5(b) with instructions that he reevaluate JCI's claim as though it had been presented utilizing an "all sums" allocation or that it be returned to the Law Division with similar instructions.

I.

As an initial matter, we reject JCI's position that the Liquidator, Special Master and Law Division judge misconstrued the terms of the Twin City policy. That policy provides in its insuring agree-

ment that:

> The company will indemnify the insured for ultimate net loss....
>
> "Ultimate net loss" is defined as:
> the total of all sums which the insured ... shall become legally obligated to pay, whether by reason of adjudication or settlement, because of an occurrence covered under the terms of the controlling underlying insurance policy and to which this policy applies *but "ultimate net loss" shall not include ... (b) costs.*
>
> ***3** (Emphasis supplied.)
>
> "Costs," in turn, are defined as:
> interest on judgments, and investigation, adjustment and *legal expenses* including taxed costs and premiums on bonds, for which the insured is not covered by underlying insurance (excluding, however, (a) all expenses for salaried employees and counsel on general retainer, (b) all office expenses of the insured, and (c) regular fees paid to counsel on general retainer)[.]
>
> (Emphasis supplied.)

The policy does not obligate Twin City to assume the defense of any claim. Significantly, however, the policy further provides:

> Subject to the above provision ["that the company shall not be obligated to assume charge of the investigation, defense or settlement of any claim or suit against the insured,"] costs incurred by the insured shall be borne as follows:
>
> ...
>
> (c) If the sum for which a claim or suit is settled exceeds the limits of underlying insurance, then the company, if it approves such settlement or consents to the continuation of the proceedings, *shall contribute to the costs incurred by the insured in the proportion which the amount of ultimate net loss as finally determined to be payable by the company bears to the total amount paid on such claim or suit by all interests[.]*
>
> (Emphasis supplied.)

Thus, Twin City is liable for "ultimate net loss," which by its definition and contrary to JCI's position excludes "costs," and is additionally liable, under specified conditions, for "costs," which include "legal expenses" but exclude "(a) all expenses for salaried employees and counsel on general retainer, (b) all office expenses of the insured, and (c) regular fees paid to counsel on general retainer[.]"

In our view, the terms of the policy, as we have set them forth, unambiguously afford coverage for defense costs separate from coverage for ultimate net loss. "An insurance policy is a contract that will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." *Flomerfelt v. Cardiello,* 202 *N.J.* 432, 441 (2010) (citing *Kampf v. Franklin Life Ins. Co.,* 33 *N.J.* 36, 43 (1960) and *Scarfi v. Aetna Cas. & Sur. Co.,* 233 *N.J.Super.* 509, 514 (App.Div.1989)). In this regard, JCI contends that the interpretation of the Twin City policy that we have adopted is contrary to the expectations of the parties, who construed coverage, contrary to policy language, as including costs within "ultimate net loss." However, we find that argument lacks support, since Twin City is not a party to this litigation, its position with respect to coverage is unknown, and evidence of the parties' practices has been obscured by entry of a settlement with respect to Twin City's coverage, the terms of which have not been disclosed in the present litigation. Thus, in considering the meaning of the Twin City policy, "we interpret the language 'according to its plain and ordinary meaning.' " *Ibid.* (quoting *Voorhees v. Preferred Mut. Ins. Co.,* 128 *N.J.* 165, 175 (1992) (citing *Longobardi v. Chubb Ins. Co.,* 121 *N.J.* 530, 537 (1990)). As a consequence, we conclude that the Liquidator was correct in determining that the coverage afforded by Twin City had not been exhausted at the time JCI's claim was submitted.

***4** We reject JCI's argument that the decision in *Affiliated FM Insurance Co. v. Owens–Corning Fiberglas Corporation,* 16 *F.*3d 684 (6th Cir.1994), supports its position that costs are included in "ultimate net loss" under Twin City's coverage. The policy at issue in *Affiliated FM* did not include the provision, contained in the Twin City policy, requiring payment of a proportional share of costs if the company approves a settlement in excess of underlying insurance limits. Indeed, the court explicitly found that the policy excluded coverage for defense costs. *Id.* at 687. Thus, the case does not resemble the present matter in terms of dispositive policy provisions and is inapposite.

Moreover, the *Affiliated FM* decision turns on an issue that is absent in the matter before us—the construction of the definition of "costs," in a policy that does not cover costs, when the definition includes "legal expenses" but excludes "all expense for salaried employees and retained counsel of and all office expense of the insured." As stated by the Sixth Circuit: "The exclusion of office expenses from the exclusion of legal expenses is incongruous in a contract that does not cover legal expenses." *Ibid.* Determining that, under Ohio law, the parenthetical could not be ignored, the court remanded the matter for consideration of extrinsic evidence as to the parties' intent regarding the coverage of defense costs under the policy. *Ibid.*[FN3] Because we have recognized that the Twin City policy covers costs, no ambiguity in the policy's definitional provisions exists. As a consequence, the remedy applied in *Affiliated FM* is wholly unnecessary here. As we have stated, the provisions of the Twin City policy are unambiguous and, as we have construed them, require payment of "costs," under specified conditions, in addition to "ultimate net loss."

FN3. The issue of how such a cost definition should be construed in a policy that does not explicitly cover costs has arisen in other cases, with varied results. *See, e.g., Continental Cas. Co. v. Pittsburgh Corning Corp.,* 917 *F.*2d 297, 299 (1990) (finding the exclusion from costs to be significant only when the policy insures against legal expense, which the policy at issue did not); *Hercules, Inc. v. AIU Ins. Co.,* 784 *A.*2d 481, 505–06 (Del.2001) (in a policy that has no explicit provision affording coverage for defense costs, the parenthetical exclusion in the definition of costs does not create coverage for such costs).

II.

We also decline to remand the matter for reevaluation of JCI's claim utilizing an "all sums" approach. From the outset, the Liquidator has uniformly required that claims against Integrity be presented utilizing a "pro rata" allocation. JCI has presented its claims in that fashion, without protest, and has benefited as the result by the allowance of $7,558,696.30 in such claims. To permit JCI to recast its claim at this late date, more than two years after the claims filing deadline has passed, would act to afford JCI a preference that was not enjoyed by any other claimant in the liquidation proceeding,[FN4] and would serve to unjustifiably disrupt the orderly termination of this lengthy liquidation process—results that are contrary to the purpose of the Uniform Insurers Liquidation Act, *N.J.S.A.* 17:30C–1, –4, –5, and –15 to –23, and precedent. *See, e.g., Matter of Mutual Benefit Life Ins. Co.,* 258 *N.J.Super.* 356, 367–68 (App.Div.1992). JCI has offered nothing that would suggest such a course of action would be legally appropriate in the circumstances presented.

FN4. JCI contends that, through the use of an "all sums" allocation, not only the $3,000,000 in coverage under policy XL 206904 would be payable, but the five additional higher level Integrity excess policies for which no claim has been filed also would be triggered.

***5** Affirmed.

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