UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	) Chapter 11
	) Case No. 12-51502-659
PATRIOT COAL CORPORATION,	) Jointly Administered
et al.,	) Honorable Kathy Surratt-States
Debtors.	)
	) Hearing Date: June 18, 2013
	) Hearing Time: 10:00 a.m.

REPLY TO DEBTORS' OBJECTION TO THE MOTION OF MARY BOWLES AND CERTAIN OTHER PLAINTIFFS FOR RELIEF FROM THE AUTOMATIC STAY

COMES NOW Mary Bowles and all of the other plaintiffs (collectively the "Movants") in the consolidated lawsuit styled, Mary Bowles, individually, and as Parent and Guardian of D.W.C, a minor, et. al. v. Massey Energy Co., et. al. Civil Action No. 09-C-212 that was filed in the Circuit Court of Boone County, West Virginia (the "State Court Action") and for their Reply to Debtors' Objection to the Motion of Mary Bowles and Certain Other Plaintiffs for Relief from the Automatic Stay state to the Court as follows:

In their Objection, Debtors indicate that stay relief should not be granted for the reason that the Settlement Agreement between the Movants and the Debtors did not include any signature of the insurers agreeing to be bound to pay the modest sum of about $37,500[1], which is the amount in issue, and further for the reason that certain insurers subsequently entered into agreements with Debtors, pursuant to which the Debtors released these insurers and agreed to indemnify them.[2] Consequently, Debtors argue that there is no direct path to the insurers to hold them accountable and liable for the modest sums and that the factors to establish whether

[1] The Settlement Agreement, on page 9, expressly provides, however, that the "Patriot Defendants, their insurers and AKS agree to pay the additional sum of $40,000" with regard to the Medicare payment. Debtors' Exhibit A

[2] Movants were unaware of the terms of the various agreements between Debtors and certain insurers prior to filing their Motion, notwithstanding that Movants had requested, in advance of filing their pleading, why stay relief should not be granted. Debtors entered into a Settlement Agreement with Movants which provided for the insurers to pay the Medicare payments and then subsequently released the some of the same insurers from any duty or obligation to provide coverage.

there is cause for relief from the stay favor Debtors[3]. However, Debtors ignore certain other facts that justify stay relief as described herein.

Debtors fail to indicate that they initiated legal action in the State Court Action in the form of a third party complaint against numerous insurance companies, seeking to compel the insurance companies to defend and indemnify the Debtors in the Bowles lawsuit.[4] Ironically, some or all of the insurers had argued, in part, that there were pollution exclusions in the policies that would relieve them from liability. While Debtors then settled with some insurers by releasing them from liability for any additional coverage for the claim in issues and agreeing to hold these certain insurers harmless, as reflected in the Exhibits attached to Debtors' Objection, they did not settle with ALL of the insurers. There are still pending actions against various other insurance companies[5], pursuant to which Debtors have staked out a position arguing that these insurers are liable.[6] Notwithstanding Debtors' position, to which they have bound themselves and should be estopped to challenge, they argue that the stay should remain in effect. Furthermore, it is uncertain whether when all the dust settles, whether the Debtors will have received enough funds from all of the insurance companies, sufficient to compensate the Movants.

Movants, like any other plaintiffs seeking to recover through insurance, should not be denied stay relief so as to preclude them from seeking recovery. They should be given every

[3] It is interesting that some of the factors addressing what constitutes "cause" deal with costs and expenses. Given the modest amount in controversy and the efforts taken to defeat this stay relief motion, it is ironic that the Debtors will end up incurring substantial costs that could be commensurate with the small amount of relief and payment that has been requested.

[4] See the Memorandum of certain Debtors in Support of their Motion for Summary Judgment in the State Court Action that identifies many of the issues. Movants' Exhibit 1. See also Movants' Exhibit 2 that contains a list of all parties to the litigation, including the numerous insurers.

[5] Debtors' counsel indicated that these claims are still pending. Movants, however, do not know the status of these proceedings nor whether Debtors have any incentive to seek coverage for the small amount of Movants' remaining claims.

[6] It is not entirely clear how many insurance companies are still potentially liable for coverage. Some of the insurance companies are believed to include, at a minimum, Century Indemnity Company, Pacific Employers Insurance Company, Indemnity Insurance Company of North America and Ace American Insurance Company.

opportunity to evaluate whether the non-settling insurance companies will be held accountable to Debtors to provide insurance coverage. Likewise, if Movants have a potential cause of action against any insurers, irrespective of whether they have settled with the Debtors or not, Movants should be given every opportunity to pursue these actions. The fact that the settling insurers may not have signed the Settlement Agreement with the Movants does not necessarily suggest an absolute bar to any recovery, as this is something that a West Virginia Court having knowledge of state law should adjudicate. All of this remains to be seen, and Movants should be afforded every opportunity to go back to state court, where the court there has retained jurisdiction with regard to insurance coverage and perhaps other issues, to seek redress. If for some reason that there is no insurance coverage, then Movants would be relegated to a general unsecured claim for the modest sum in issue. But, if there is coverage, whether as a result of the non-settling insurers being compelled to indemnify the Debtors, or whether as a possible direct claim against the settling insurers or whether for any other reason, Movants should have their day in court.

ACCORDINGLY, Movants state that there is ample cause for granting stay relief and denying the Debtors' Objections.

SUMMERS COMPTON WELLS PC

Date: June 13, 2013

By:/s/ David A. Sosne

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic filing in the CM/ECF system of the United States Bankruptcy Court for the Eastern District of Missouri to the parties requesting service by electronic filing. I hereby also certify that a copy of the foregoing was served via United States Mail, first class postage prepaid, on the date of the electronic filing of this document to those individuals and entities not requesting service by electronic filing. The individuals and entities being served electronically or by mail are:

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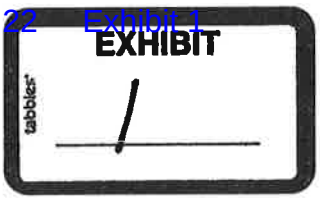
June 13, 2013 /s/ Christina Hauck



IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

MARY BOWLES, individually, and as Parent and Guardian of DUSTIN WADE COOPER, a minor, Plaintiffs, v. MASSEY ENERGY COMPANY, et al., Defendants, PATRIOT COAL CORPORATION, et al., Third-Party Plaintiffs, v. ACE AMERICAN INSURANCE COMPANY, et al., Third-Party Defendants.	Consol. Civ. Action No. 09-C-212 Judge William S. Thompson

MEMORANDUM IN SUPPORT OF PATRIOT THIRD-PARTY PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE WHETHER THIRD-PARTY DEFENDANTS CENTURY INDEMNITY COMPANY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, PACIFIC EMPLOYERS INSURANCE COMPANY AND ACE AMERICAN INSURANCE COMPANY HAVE A DUTY TO DEFEND

Introduction

Based on well-settled principles of West Virginia law and the February 18, 2011 decision (Facts, Ex. 5) of the West Virginia Mass Litigation Panel (the "Panel") in the Mingo County Litigation,[1] Patriot Third-Party Plaintiffs[2] are entitled to partial summary judgment and an Order declaring that Third-Party Defendants Century Indemnity Company ("Century"), Indemnity Insurance Company of North America ("Indemnity of North America"), Pacific Employers Insurance Company ("Pacific") and Ace American Insurance Company ("Ace") (collectively, the "Remaining Primary Insurers") have a duty to defend Patriot with respect to the claims filed by the Plaintiffs in the underlying *Bowles* Lawsuit (the "Underlying Claims").[3] Patriot settled with its other primary insurers because they agreed to make substantial contributions toward the pending settlement of the Underlying Claims (Facts ¶39). The Remaining Primary Insurers sold primary coverage policies to Patriot covering 14 of the 26 years at issue, yet they have

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[1] "Mingo County Litigation" herein refers to a consolidated action currently pending in Mingo County Circuit Court, under Case No. 06-C-520 MNG, in which the underlying lawsuits involve different parties but very similar claims and allegations (*see* Facts ¶ 34, Ex. 4).

[2] "Patriot Third-Party Plaintiffs" or "Patriot" as used herein refers to Third-Party Plaintiffs Patriot Coal Corporation ("Patriot Coal"), Heritage Coal Company LLC f/k/a Peabody Coal Company, LLC f/k/a Peabody Coal Company ("Heritage") and Pine Ridge Coal Company, LLC f/k/a Pine Ridge Coal Company ("Pine Ridge").

[3] The "*Bowles* Lawsuit" as used herein refers to the consolidated case styled *Mary Bowles, et al. v. Massey Energy Company, et al.* Consolidated Civil Action No. 09-C-212, which is currently pending before this Court.

continually failed and refused to acknowledge any duty to defend or contribute toward Patriot's defense (Facts ¶38).

On February 18, 2011, the Panel granted partial summary judgment in favor of the mining companies in the Mingo County Litigation, holding that the primary insurers have a duty to defend. Specifically, the Panel held that the insurance policies impose a duty to defend where, as here, the underlying plaintiffs allege that the mining companies "negligently conducted [their] mining and coal processing operations . . . which resulted in damage to plaintiffs' water supply, and allegedly caused plaintiffs to suffer bodily injury and property damage." Facts, Ex. 5, Panel, pp. 3-4. According to the Panel, these allegations trigger the insurers' duty to defend because the allegations reflect that there has been an "occurrence" within the meaning of the policies and the allegations are "susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.*, citing *Aetna Casualty & Surety Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986) and *Horace Mann Ins. Co. v. Leeber*, 376 S.E.2d 581, 584 (W. Va. 1988).

Despite the allegations in the Underlying Claims, the broad standard governing their defense obligations and the Panel's February 18, 2011 decision, the Remaining Primary Insurers have failed and refused to participate in or contribute toward Patriot's defense and have failed and refused to acknowledge having any duty to do so. (Facts ¶38). As set forth below, there is no genuine issue of material fact and the Remaining Primary Insurers have a duty, as a matter of law, to defend Patriot against the Underlying Claims.

I. UNDISPUTED FACTS

A. The Remaining Primary Insurers' Policies Indisputably Impose a Duty to Defend Patriot Against Claims Alleging Bodily Injury, Property Damage and Personal Injury

Patriot's potential exposure for the Underlying Claims begins in 1984, when Patriot's predecessor, Peabody Coal Company, purchased the property and mining operations and continues through 2009, when the Underlying Claims were filed (Facts ¶3). The Remaining Primary Insurers sold Patriot comprehensive general liability insurance policies providing primary coverage for 14 policy years between 1993 and 2007 ("Subject Policies") (Facts ¶1). Thus, the Remaining Primary Insurers' policies provided primary liability coverage for 14 of the 26 policy years at issue.

The Subject Policies are "occurrence-based" policies under which the insurers' obligations to indemnify Patriot are triggered or activated by the happening of an "occurrence," causing "bodily injury," "property damage" or "personal injury," as these terms are defined by the policies. Each of the Subject Policies contains the same, or substantially the same, definition of "occurrence," which is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (Facts ¶19).

The Subject Policies also contain the same, or substantially the same, definition of "bodily injury" and "property damage." "Bodily injury" is generally defined as:

> [B]odily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

(Facts ¶21). "Property damage," is generally defined as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Facts ¶22).

The Subject Policies additionally contain the same, or substantially the same, language covering claims arising out of personal injury. The personal injury coverage applies to, among other things, the offense of "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy" (Facts ¶23).

In addition to providing indemnity coverage, the Subject Policies also contain broad language obligating the Remaining Primary Insurers to investigate and defend, or pay the costs of defending any claim against Patriot seeking damages on account of bodily injury, property damage or personal injury that is alleged to have taken place, in whole or in part, during the policy periods. This broad "duty to defend" language typically found in these policies is as follows:

> [The Insurer] will have the right and duty to defend the insured against any "suit" seeking ["bodily injury," "property damage", or personal injury].

(Facts ¶24).

Based on all of the foregoing broad policy provisions, the Subject Policies clearly impose upon the Remaining Primary Insurers a duty to defend Patriot where, as here, the Underlying Claims allege events constituting an "occurrence"

causing "bodily injury," "property damage" or personal injury during the covered policy period.

B. The Underlying Claims Allege That Patriot Negligently Caused Bodily Injury, Property Damage and Personal Injury

The Underlying Claims allege harm and damages related to Patriot's allegedly negligent coal mining operations over the past several decades in and around Seth and Prenter, Boone County, West Virginia (Facts ¶¶26, 27). During coal mining operations, raw coal is separated from non-coal rocks and minerals (Facts ¶25). The raw product is often crushed, washed with water, and processed through various procedures at the preparation plant, which separates the raw coal from non-coal rocks, minerals and more refined coal (*id.*). The raw coal is then shipped to the customer (*id.*). The materials removed from the raw coal are placed in above-ground slurry impoundments (*id.*). These practices and procedures are standard in the coal mining industry (*id.*).

The *Bowles* Lawsuit further alleges that over a period of many years, certain of the mineral substances from the original raw coal that was mined infiltrated and damaged the plaintiffs' water supply (Facts ¶28). The *Bowles* Lawsuit alleges that, as a result of the damage to the water supply, the plaintiffs are suffering bodily injury, and the plaintiffs' property is being damaged (Facts ¶30). The *Bowles* plaintiffs seek compensatory damages for this alleged bodily injury and property damage, as well as other relief.

In addition to making allegations of bodily injury and property damage, the *Bowles* Lawsuit alleges that Patriot's mining activities created a nuisance through "unreasonable interference with the exercise of rights common to the general public,

significantly interfering with public health, safety and peace" (Facts ¶31). These nuisance claims further allege that Patriot's conduct has caused the release of "toxic substances which have migrated to the Plaintiffs' former residence, [and] irrevocably and substantially disturbed their use of the subject property and rendered its physical occupation uncomfortable" (Facts ¶32). Furthermore, the *Bowles* Lawsuit alleges that Patriot's conduct constitutes a violation of the West Virginia Surface Coal Mining and Reclamation Act, alleging that Patriot's surface mining operations were negligent and have "[i]mpaired the environmental quality of the area," "[a]dversely affected the public welfare and safety" and "[c]reated present actual and/or probable hazards to public health and/or safety" (Facts ¶33).

As more fully set forth in §II.B. of this memorandum, these allegations clearly reflect an "occurrence" that allegedly caused "bodily injury," "property damage" and/or personal injury within the meaning of the policies, thereby triggering the Remaining Primary Insurers' duty to defend.

C. The Remaining Primary Insurers Have Failed and Refused to Participate in or Contribute Toward Patriot's Defense and Have Failed and Refused to Acknowledge Any Duty to Do So

In September 2009, Patriot provided timely notice of the Underlying Claims to the Remaining Primary Insurers and requested defense and indemnity (Facts ¶36). Despite Patriot's request, the Remaining Primary Insurers failed and refused to participate in Patriot's defense or to acknowledge their duty to defend and indemnify Patriot (Facts ¶¶37-38). So, on December 10, 2009, Patriot filed the present declaratory judgment action, seeking a ruling that its insurers must fulfill their defense and indemnity

obligations. Since then, and even after the Panel's 2/18/11 decision, the Remaining Primary Insurers continued to fail and refuse to participate in or contribute toward Patriot's defense and have refused to acknowledge any duty to do so (Facts ¶38).

Based on the foregoing undisputed facts and the authorities set forth below, the Remaining Primary Insurers owe to Patriot, as a matter of law, a duty to defend it against the Underlying Claims.

II. ARGUMENT

AS A MATTER OF LAW AND UNDISPUTED FACT, THE REMAINING PRIMARY INSURERS HAVE A DUTY TO DEFEND PATRIOT AGAINST THE UNDERLYING CLAIMS

A. West Virginia Summary Judgment Standard

West Virginia law mandates that a motion for summary judgment should be granted where, as here, "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 133 S.E.2d 770, 777 (W. Va. 1963). Furthermore, summary judgment is appropriate if the record "could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 336 (W. Va. 1995).

As explained below, the undisputed facts demonstrate that the Remaining Primary Insurers have a duty, as a matter of law, to defend Patriot against the Underlying Claims.

B. The Remaining Primary Insurers Have a Duty, as a Matter of Law, to Defend Patriot Because the Allegations Reflect an "Occurrence" as Defined by the Policies and the Allegations Are Reasonably Susceptible of an Interpretation that They Are Covered by the Policies

On February 18, 2011, the West Virginia Mass Tort Litigation Panel granted partial summary judgment in favor of the mining companies in the Mingo County Litigation, ruling that the primary insurers have a duty to defend. Facts, Ex. 5. The plaintiffs' claims against Massey in the Mingo County Litigation are virtually the same as Plaintiffs' Underlying Claims against Patriot (and Massey) here. In both cases, the plaintiffs allege that the mining companies negligently conducted their mining and coal processing operations, which resulted in damage to plaintiffs' water supply, and allegedly caused plaintiffs to suffer bodily injury and property damage during the periods of the insurance policies at issue. Facts, Ex. 5, Panel Decision, pp. 3-4; Facts ¶¶26-30.

In deciding that there was a duty to defend, the Panel determined first that the allegations demonstrated that there had been an "occurrence" within the meaning of the policies. Facts, Ex. 5, Panel Decision, p. 2. The Panel then concluded that the allegations were "susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.* at pp. 3-4. Both of these conclusions are likewise appropriate in this case.

Like the policies at issue in the Mingo County case, the policies at issue here define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Facts, Ex. 5, Panel Decision, p. 2; Facts ¶19. "[I]n determining whether under a liability insurance policy an occurrence

was or was not an 'accident' – or was or was not deliberate, intentional, expected, desired, or foreseen – primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue." *Id.*, citing *Columbia Casualty Co. v. Westfield Insurance Co.*, 617 S.E.2d 797, 801 (W. Va. 2005). As the Panel explained, "[t]he purpose of insurance liability policies is to provide a defense and indemnification to an insured for claims arising from the insured's own negligent acts or omissions." *Id.* at p.p. 2-3. The Panel found that the underlying plaintiffs' alleged injuries "were not intended, expected, desired, or foreseen" and that "therefore, there was an 'occurrence'" under the policies at issue. *Id.* at p. 3.

The Panel next explained that under West Virginia law, an insurer's duty to defend is tested by whether the allegations in the plaintiff's complaint "are susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.*, citing *Aetna Casualty & Surety Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986); *see also Tackett v. American Motorists Insurance Co.*, 584 S.E.2d 158, 162 (W.Va. 2003). Any ambiguities in insurance policies must be liberally construed in favor of the insured and any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured. Facts, Ex. 5, Panel Decision, p. 3, citing *Aetna*, 342 S.E.2d at 160. Furthermore, "[i]f part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims[.]" *Horace Mann Insurance Company v. Leeber*, 376 S.E.2d 581, 584 (W. Va. 1988).

The plaintiffs in this case, like the plaintiffs in the Mingo County Litigation, have alleged that mining company defendants negligently conducted their mining and coal processing operations, which resulted in damage to the plaintiffs' water supply, and allegedly caused plaintiffs to suffer bodily injury and property damage (Facts ¶30). Consistent with the Panel Decision, these allegations demonstrate an "occurrence" within the meaning of the policies and therefore triggered the Remaining Primary Insurers' defense obligations because these claims are "susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." Facts, Ex. 5, Panel Decision, p. 4.[4] Accordingly, based on well-established principles of West Virginia law, as applied and decided by the Panel in Mingo County, the Remaining Primary Insurers have a duty, as a matter of law, to defend Patriot against the Underlying Claims.

For all of these reasons and those set forth in Patriot's Motion, there is no genuine issue of material fact and Patriot is entitled as a matter of law to partial summary judgment and an order declaring that Third-Party Defendants Century, Indemnity of North America, Pacific and Ace have a duty to defend Patriot against the Underlying Claims.

[4] The fact that the policies at issue contain potentially applicable exclusions does not prevent the duty to defend from being triggered. The policies at issue in the Mingo County Litigation also contained similar exclusions. *See* Facts, Ex. 5, Panel Decision, pp. 4, 6. The Panel nevertheless held that the duty to defend had been triggered because the allegations were "susceptible" to being covered, even though later-discovered facts may indicate that certain exclusions may apply. *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of June, 2011, I served the foregoing upon the following counsel, by electronic mail addressed as follows:

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Navigators Insurance Company, as Successor-in –Interest to New York Marine Managers, Inc.	
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North Star Reinsurance Corporation	
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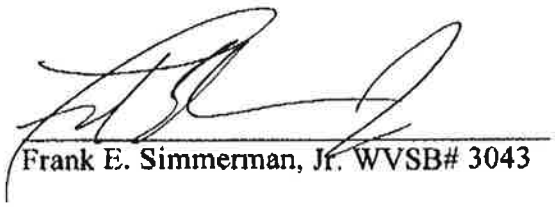

Frank E. Simmerman, Jr. WVSB# 3043

MASTER SERVICE LIST

Bowles, et al. v. Massey Energy Co., et al.,
Consolidated Civil Action No. 09-C-212 (Boone County Cir. Ct.)
Adkins, et al. v. Massey Energy Co., et al.,
Consolidated Civil Action No. 09-C-59 (Boone County Cir. Ct.)

I, John E. Sutter, counsel for Plaintiffs, hereby certify that I have served a true and exact copy of **PLAINTIFFS' SUPPLEMENT TO PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT** to counsel below this 7th day of January 2013, by United States mail to:

AIG Casualty Company f/k/a Birmingham Fire Insurance Company, AIU Insurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA	
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Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America	
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Allstate Insurance Company, solely as successor-in-interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company ("Northbrook")	
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