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| STATE OF OHIO | ) | IN THE COURT OF COMMON PLEAS |
| | ) SS: | |
| CUYAHOGA COUNTY | ) | CASE NO. CR-578004 |

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| RPM, INC., et al. | ) | |
| | ) | |
| Plaintiffs | ) | |
| | ) | |
| vs | ) | **JOURNAL ENTRY** |
| | ) | |
| CHUBB CUSTOM INSURANCE, et al. | ) | |
| | ) | |
| Defendants | ) | |

**MICHAEL J. RUSSO, JUDGE**:

This matter involves, among other things, a coverage dispute between Plaintiffs RPM, Inc., Dryvit Systems, Inc., and Dryvit Systems Canada, as well as their excess insurance carriers, Defendants Great American Assurance Company and Chubb Custom Insurance Company.[1] The parties seek a declaratory judgment concerning whether or not the excess insurance policies contain a duty to defend and an obligation to reimburse defense costs. With respect to Chubb, a separate question arises as to whether its policy is triggered through exhaustion of the underlying coverage. For the following reasons, the Court declares that the excess policies do not contain a duty to defend nor an obligation to reimburse defense costs. The Court also finds that Chubb's policy for the 1995 – 1996 policy period is not triggered through exhaustion of the underlying coverage.

[1] Plaintiffs' third amended complaint alleges claims of breach of contract and bad faith against its excess insurers, Great American and Chubb; additionally, claims of negligence are alleged against Plaintiffs' insurance broker, Defendant Marsh USA, as successor to Johnson & Higgins of Ohio, Inc.

## FACTUAL BACKGROUND

The relevant facts are not in dispute. RPM, Inc. (hereinafter "RPM") acquired Dryvit Systems, Inc. in September 1995. Dryvit Systems Canada is a subsidiary of Dryvit Systems, Inc. Dryvit Systems, Inc. and Dryvit Systems Canada (hereinafter and collectively "Dryvit") manufactured and distributed an exterior wall-cladding product known as EIFS (i.e., an "exterior insulation and finishing system"). EIFS was installed in commercial and residential structures throughout the United States and Canada. Numerous lawsuits have been filed against Dryvit alleging that EIFS is defective and has caused or permitted water intrusion at various sites.

During the time period in question, RPM's insurance program contained multiple layers of insurance. RPM's primary commercial general liability policy was through a captive insurer, First Colonial Insurance Company, with limits as follows: $1 million per occurrence/$8 million products aggregate/$7 million all other. The first excess layer for this time period, a lead umbrella policy issued by American Alternative Insurance Corporation (hereinafter "AAIC"), had aggregate limits of $10 million. The second excess layer of coverage was through Great American Assurance Company fka Agricultural Insurance Company (hereinafter "Great American"), with aggregate limits of $10 million. The third excess layer of coverage was through Chubb Custom Insurance Company (hereinafter "Chubb"), with aggregate limits of $10 million. The AAIC, Great American, and Chubb policies were renewed for the policy year 1996 –1997 under the same terms and conditions, except the AAIC and Great American policies were each increased from $10 million to $20 million.[2] Beginning in the late 1990s, RPM received a significant number of water intrusion claims. RPM reached an agreement with AAIC, the lead

[2] Accordingly, the discussion regarding the duty to defend and obligation to reimburse defense costs applies to both policy periods.

umbrella carrier, whereby it paid policy limits of $10 million for 1995 – 1996 and $20 million for 1996 –1997, plus defense costs in addition to those limits. For the 1995- 1996 policy period, pursuant to a "Defense Cost and Indemnity Sharing Agreement for EIFS Claims," Great American paid policy limits of $10 million.[3] For the 1996 –1997 policy period, Great American has not made any payments. Chubb has declined to pay any indemnity amounts or defense costs for either policy period.

The respective parties have filed the following motions. RPM and Dryvit have moved for partial summary judgment against Great American seeking a declaration that Great American has a duty to defend and pay defense costs in addition to limits under the 1995 and 1996 policies. RPM and Dryvit have moved for partial summary judgment against Chubb seeking a declaration that Chubb has a duty to defend and pay defense costs in addition to limits under the 1995 and 1996 policies. Defendant Marsh has moved for partial summary judgment on the claims of RPM and Dryvit that both Great American and Chubb have a duty to defend and an obligation to reimburse defense costs. Great American has moved for partial summary judgment seeking a declaration that it has no duty to defend or pay defense costs. Chubb has moved for partial summary judgment seeking a declaration that it has no duty to defend or obligation to reimburse defense costs and that its policies are not yet triggered through exhaustion.

**DUTY TO DEFEND**

The Ohio Supreme Court has consistently held that insurance contracts must be construed in accordance with the same rules as other written contracts. *Hybud Equip. Corp. v. Sphere Drake Ins. Co. Ltd* (1992), 64 Ohio St.3d 657, 665. In general, a Court determines the intent of

[3] Great American disputes that it has an obligation to reimburse defense costs, but tendered $10 million dollars. The Agreement does apportion some of the $10 million limits to defense costs.

the parties by examining the contract as a whole and presuming that the intent of the parties is reflected in the language used in the policy. In arriving at the meaning of a contract, the words of the contract must be given their "plain and ordinary meaning" unless another meaning is clearly apparent from the contents of the policy. *Cincinnati Insurance Company v. CPS Holdings, Inc.,* 115 Ohio St.3d 306, 307–308, 2007-Ohio-4917.

The parties are in agreement that the AAIC policy 01-A2-UM-0000007-00 is the "controlling underlying insurance" to which both the Great American and Chubb policies follow form.[4] The AAIC policy contains both a duty to defend and a duty to pay defense costs in addition to limits.[5] Great American and Chubb dispute that their policies contain a duty to defend. The starting point for determining whether there is a duty to defend is the language of the insurance policies.

Both Great American and Chubb contain similar defense provisions. Great American's policy states:

**Section III – CONDITIONS**

2. Loss Adjustment

   a. We shall not be required to assume charge of the settlement or defense of any claim, suit or proceeding against you.
   b. We shall have the right and be given the opportunity to be associated with you or your underlying insurer, or both, in the handling of any claim, suit or proceeding involving an occurrence which in our opinion may create liability upon us for loss. Each party shall cooperate in all things in the handling of such claim, suit or proceeding.

[4] This legal obligation is denoted in the respective declarations pages of the Great American and Chubb policies. See Great American policies EXC 8815758 and EXC 1802286 at (Item 5) at Schedule of Underlying Policies; see also Chubb policies (96)/(97) 7947-74-00 at Declarations Underlying Insurance (Item 6) at page 2.

[5] See AAIC policy at III. Defense Provisions.

Likewise, Chubb's policy states:

> **Defense and Supplementary Payments**
>
> We will not be obligated to assume charge of the investigation, settlement, or defense of any claim made, or suit brought, or proceedings instituted against you. We will, however, have the right to participate in the investigation, settlement or defense of any suit or proceeding which relates to any occurrence that we feel may create liability on our part under the terms of this policy. We will not defend any suit after we have exhausted the applicable Limits of Insurance as stated in Item 4 of the Declarations.

Great American uses the language "shall not be required" and Chubb uses "will not be obligated," but the language is clear and of the same effect: neither insurer has a specific duty to defend, but each reserves the opportunity or right to participate in a defense. The theory as to why this language does not create a duty to defend is succinctly set forth in a law review article entitled *Rights and Responsibilities of Excess Insurers* by Douglas R. Richmond:

> "Generally, it is the primary insurer's responsibility to defend an insured against a potentially covered claim or suit. An excess insurer typically has no duty to defend its insured until the limits of the underlying coverage are exhausted, or until the insured's SIR is exhausted. However, an excess insurer may elect to participate in its insured's defense where its policy limits are implicated. This right is contractual. Excess insurers need an option to defend in order to protect themselves in cases where the insured's exposure exceeds its primary policy limits and the primary insurer is not mounting a strong defense. Most courts hold that even where an excess policy gives the insurer the right to and option to defend, such language does not create a *duty* to defend. The intent of the policy provisions granting an excess insurer a right and option to participate in its insured's defense is to protect the insurer, not the insured. The majority position also makes sense because an insurer's duty to defend is expressly contractual, and if there is no policy language requiring an insurer to defend, there can be no duty to do so."[6]

[6] 78 DENULR 29 at pages 44 – 45.

RPM and Marsh have argued that because Great American and Chubb follow-form to the AAIC policy (which contains a duty to defend), then it should follow that Great American and Chubb have a duty to defend. The Court finds this argument unpersuasive. To the extent the language of a primary policy and a following-form excess policy differ, the terms of the excess policy control. *Tscherne v. Nationwide Mutual Insurance Company*, 8th Dist. No. 81620, 2003-Ohio-6158, 2003 WL 22724630. In this case, both excess insurers have clearly announced that they do not have a duty to defend. The language of the excess policies therefore must control.

The Federal District Court for the Southern District of New York recently had the opportunity to review many excess insurance policies with similar "not obligated to assume charge but reserve the right" language and it came to the same conclusion. The Court found that the language in the policies expressly disclaimed any duty to defend. See *In re September 11 Liability Insurance Coverage Cases* (S.D.N.Y. 2006), 458 F. Supp. 2d 104, 128-129. See also *Grace v. Insurance Company of North America* (Alaska 1997), 944 P.2d 460, 466, and *Schwinn Cycling &Fitness, Inc. v. Hartford Accident and Indemnity Company* (N.D. Illinois 1994), 863 F. Supp. 784, 787. In similar fashion, neither Great American nor Chubb have a duty to defend under their respective policies.

**OBLIGATION TO REIMBURSE DEFENSE COSTS**

The next issue before the Court is whether or not the policies contain an obligation to reimburse defense costs. Under Ohio law, an agreement to pay defense costs in an excess policy may exist in the absence of the acceptance of the duty to defend. See, for example, *North River Insurance Company v. Cigna Reinsurance Company* (C.A.3, 1995), 52 F.3d 1194, 1210. Although the Court has already determined there is no duty to defend, there may still be an

obligation to reimburse RPM and Dryvit for defense costs. Again, the starting point for this type of determination is the language of the policies. Each policy will be looked at separately because the language of the respective policies is different.

Great American's policy states as follows concerning its duty to reimburse defense costs:

> **Section I – COVERAGES**
>
> > In consideration of the payment of premium, we agree to pay on your behalf for loss excess of the Limits of Insurance shown in item 5 (C) of the declarations.
> >
> > * * *
>
> **Section III – CONDITIONS**
>
> 2. Loss Adjustment
>
> > C. Upon final determination of your liability, we shall promptly pay on your behalf the amount of any loss covered by this policy. We shall have the benefits of any recoveries applicable to losses paid under this policy. Loss expense and legal expense, including court costs and interest, incurred by you at our direction will be paid by us.

From the language of the policy, it is clear that Great American is required to pay for covered "loss" in excess of the underlying insurance. The language of the policy also makes clear that separate and apart from paying for covered "loss," Great American will also pay for "loss expense" and "legal expense" that is incurred at its direction. Under the recognized principle of *expressio unius est exclusion alterius* (i.e., "mention of one implies exclusion of another"), the separate treatment of "loss" and "loss expense and legal expense" means that "loss" does not include "expenses." See *Schwartz v. Stewart Title Guar. Co.* (1999), 134 Ohio App.3d 601, 607. Therefore, not only does "loss" not include "loss expense and legal expense," but Great American is only required to pay "loss and legal expense" incurred at its direction.

Although the term "loss" is not defined in the policy, the mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108. A Court must give undefined words used in an insurance contract their plain and ordinary meaning. *Miller v. Marroco* (1986), 28 Ohio St.3d 438, 439. Additionally, the Court must examine the policy as a whole. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130. A plain and ordinary reading of the policy language shows that upon a final determination of RPM's liability, Great American will indemnify RPM for the amount of loss covered by its policy. Reading the policy as a whole, "loss expense and legal expense, including court costs and interest" must mean defense costs, and the only expenses Great American is obligated to pay are those expenses incurred at its direction. Great American denies that it has directed RPM or Dryvit to incur "loss expense" or "legal expense" and no evidence has been submitted to the contrary. As a result, the Court has determined that Great American is not obligated to reimburse defense costs.

With respect to Chubb, its policy states as follows concerning it duty to reimburse defense costs:

> **Insuring Agreements**
>
> We will pay on behalf of the insured, that part of **loss** covered by this insurance in excess of **underlying limits of insurance**, provided the injury or offense takes place during the Policy Period of this policy.
>
> "Loss" and "Underlying Insurance" are defined in the **Definitions:**
>
> **Loss** means those sums actually paid in the settlement or satisfaction of a claim which the insured is legally obligated to pay as damages because of injury or offense, after making proper deductions for all recoveries and salvage. **Loss** includes defense and supplementary expense payments if such payments are included within the limits of any respective **underlying insurance**, by the terms of the policy.

> **Underlying Insurance** means the policy or policies as stated in Item 6 of the Declarations including **controlling underlying insurance**.

The language of the policy sets forth that "loss" may include defense and supplementary expenses payments if such payments are included within the limits of any respective underlying insurance. Item 6 of the Declarations page lists AAIC as the controlling underlying policy and Great American as other underlying insurance. The AAIC and Great American policies do not include defense payments within the limits of insurance under the term of their policies. AAIC's policy specifically states that when it assumes charge of the defense, it will pay "in *addition* to applicable limits of liability all expenses we incur." This Court has already determined that Great American does not have an obligation to reimburse defense costs. Since neither policy includes defense payments within the limits of their respective policies, defense costs are not included in "loss" and Chubb thus is not obligated to reimburse defense costs.

The foregoing determination is consistent with the following provisions under the Chubb policy. Under the Defense and Supplementary Payments section, the policy sets forth the expenses Chubb will pay:

> C. We will only pay the following expenses:
>
> 1. If the insured becomes legally liable for the interest that accrues on a judgment after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable Limits of Insurance, then we will pay the interest on the part of the judgment to which this policy applies.
>
> 2. Expenses incurred directly by this Company and at the sole discretion of this Company.
>
> 3. Pre-judgment interest awarded against the insured on that part of the judgment we pay. However, if we make an offer to pay the applicable Limits of

> Insurance, prior to judgment, we will not pay any pre-judgment interest that accrues after our offer.

Because defense costs are not an enumerated expense that the policy pays, Chubb is not obligated to reimburse defense costs.

**EXHAUSTION**

The final issue for consideration is whether or not Chubb's policy is triggered through exhaustion of the underlying coverage. "Generally, for an excess insurer to have any obligation to its insured, the primary insurer must pay its policy limits toward the satisfaction or settlement of the claim or judgment against the insured. A primary insurer that properly pays its policy limits is said to have 'exhausted' its limits." 78 DENULR 29, 77.

Under vertical exhaustion, the first in time primary and excess policies will be exhausted before the next-in-time primary and excess policies will be tapped. As Chubb's policy states: "this liability insurance policy provides excess coverage over the underlying limits of insurance stated in Item 5 of the Declarations." Item 5 identifies $20,000,000.00 as the underlying limits of insurance. Additionally, the insuring agreement confirms that Chubb "will pay on behalf of the insured, that part of loss covered by this insurance in excess of underlying limits of insurance." The parties do not dispute that AAIC has tendered their policy limits of $10 million for the policy period 1995 -1996. Great American has paid $10 million as well. Chubb argues that Great American's policy is not exhausted because some of the $10 million was apportioned to indemnity and some to defense costs. The Court agrees. The evidence before the Court at this juncture indicates that a portion of the $10 million paid by Great American to Plaintiffs was for

payment of defense costs, not just indemnity payments.[7] As a result, the evidence indicates that Great American has not paid $10 million dollars for indemnification of claims, which would trigger Chubb's obligation under its excess policy. Payment by Great American to Plaintiffs under a 2004 side agreement in derogation of the original policy cannot be a basis for triggering Chubb's liability under its policy issued nine years prior to that.

Accordingly, the motions of RPM and Dryvit for partial summary judgment against Great American and Chubb are denied. The motion of Marsh for partial summary judgment is denied. Motion of Great American for partial summary judgment is granted. Motion of Chubb for partial summary judgment is granted. The Court hereby declares that the excess policies of Great American and Chubb for the 1995 –1996 and the 1996-1997 policy periods do not contain a duty to defend nor an obligation to reimburse defense costs. The Court also declares that Chubb's policy for the 1995 –1996 policy period is not triggered through exhaustion of the underlying coverage.

**IT IS SO ORDERED.**

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MICHAEL J. RUSSO, JUDGE

Date: November ____, 2009

[7] See Addendum to the Defense Cost and Indemnity Sharing Agreement for EIFS claims dated March 2004.

**CERTIFICATE OF SERVICE**

A copy of the foregoing **Journal Entry** was sent by regular U.S. mail this ____ day of November 2009 to:

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MICHAEL J. RUSSO, JUDGE