IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

UNITED STATES FIRE INSURANCE COMPANY, Plaintiff	: February Term, 2000
	: No. 3986
v.	
	: Commerce Program
AMERICAN NATIONAL FIRE INSURANCE COMPANY, Defendant	: Control Numbers 040480 and 040621
	:

ORDER

AND NOW, this 8th day of July 2002, upon consideration of: (a) the Motion for Summary Judgment of third party defendant, Liberty Mutual Fire Insurance Company, the opposition to it of defendant/third-party plaintiff, American National Fire Insurance Company, and (b) the Motion for Summary Judgment of the defendant/third-party plaintiff (American) and the response in opposition of plaintiff, United States Fire Insurance Company, the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** as follows:

a. The Motion of third party defendant, Liberty Mutual Fire Insurance Company is **Granted**; and

b. The Motion of defendant, American National Fire Insurance Company is **Granted**.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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<u>O P I N I O N</u>

Albert W. Sheppard, Jr., J. .... July 8, 2002

Third party defendant, Liberty Mutual Fire Insurance Company ("Liberty"), has filed a Motion for Summary Judgment ("Liberty's Motion"), seeking judgment on the claims of defendant, American National Fire Insurance Company ("American"). American, in turn, has filed a Motion for Summary Judgment ("American's Motion") seeking judgment on the claims of plaintiff, United States Fire Insurance Company ("U.S. Fire").

For the reasons discussed, both Motions are granted.

BACKGROUND

In 1995, I.A. Construction Company ("I.A. Construction") was operating as a subcontractor of James J. Anderson Construction Company, Inc. ("Anderson"). Under the contract between I.A. Construction and Anderson ("Subcontract"), I.A. Construction was responsible for providing $1 million in personal injury insurance and defending Anderson against any claims that arose from work carried out by I.A. Construction. To fulfill its obligations under the Subcontract, I.A. Construction purchased a primary insurance policy with a limit of $2 million per occurrence from Liberty ("Liberty Policy").[1] I.A. Construction also purchased an excess policy with a limit of $20 million per occurrence from American ("American Policy"). Under the American Policy, I.A. Construction was obliged to give notice to American "[w]henever it appear[ed] that an occurrence, claim or 'suit' [was] likely to involve" the American Policy. Def. Ex. E Umbrella IV.C.1.[2]

On June 6, 1995, Keith Voiro, an employee of I.A. Construction, was injured at the American construction site. When Voiro filed suit against Anderson on May 10, 1996,[3] Anderson tendered its defense to I.A. Construction. I.A. Construction, in turn, contacted Liberty, which provided the defense

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[1] More specifically, the Liberty Policy was purchased by COLAS, Inc. ("COLAS"), I.A Construction's parent corporation.

[2] Neither the American Policy nor the Liberty Policy has a governing law provision. Because all relevant events occurred in Pennsylvania and both parties rely exclusively on Pennsylvania law, the court will apply Pennsylvania law.

[3] Voiro v. PECO Energy and James J. Anderson Constr. Co., C.P. Phila. May 1996, No. 1035 ("Voiro Action").

for Anderson in accordance with the Liberty Policy's blanket additional insured provision.[4] American alleges that Liberty was aware of the American Policy and had information by March 6, 1998 that liability in the Voiro Action could exceed $2 million, but did not contact American until September 4, 1998.

The Voiro Action settled for $4.8 million on November 17, 1998, with Anderson's share amounting to $4.0 million. Liberty paid $2.0 million toward the Voiro settlement, but American refused to contribute, claiming that I.A. Construction had not notified it of the Voiro Action or permitted it to participate in that defense.

Because of American's refusal, Anderson's primary and excess insurers agreed to provide the remaining $2.0 million to complete the Voiro Action settlement ("Settlement").[5] U.S. Fire subsequently brought this action against American to recover the amount of its contribution under breach of contract and equitable subrogation theories. American filed a joinder complaint, which joined Liberty and sought a declaratory judgment holding that Liberty is solely liable, liable over to American by way of contribution and/or indemnity and/or is jointly or severally liable with American.

On April 6, 2001, this court issued an order denying a Liberty motion for summary judgment and an opinion ("April Opinion") explaining its reasons.[6] Liberty argues that additional information presents new grounds for granting summary judgment in its favor.

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[4] Anderson met the criteria for an "insured" under the Liberty Policy. See Liberty's Memorandum Ex. E.

[5] Anderson's primary insurer was Pennsylvania Manufacturers' Association Insurance Company, while its excess insurer was United States Fire Insurance Co. ("U.S. Fire").

[6] The April Opinion may be found at 53 Pa. D. & C.4th 474 (2001).

DISCUSSION

Liberty has provided sufficient grounds to distinguish the present posture of this matter from that addressed in the April Opinion. Accordingly, Liberty's Motion is granted.

Similarly, U.S. Fire fails to confront the arguments in American's Motion, and that Motion, too, is granted.

I. Liberty Is Entitled to Summary Judgment on American's Claim Against it

Liberty urges that several occurrences and changed circumstances since the April Opinion render summary judgment appropriate now. After careful consideration, the Court agrees.

In the April Opinion, the Court found that Liberty potentially owed American a direct duty of notification. The Court first considered American Centennial Insurance Co. v. Warner-Lambert Co., 681 A.2d 1241 (N.J. Super. Ct. Law Div. 1995), in which the New Jersey Superior Court examined the liability of a primary insurer that failed to give notice to an excess carrier of a pending claim that ultimately implicated the excess policy. After reviewing the "distinctive" and "unique relationship" in which "the excess insurer relies upon the primary carrier to act in good faith in processing claims," the American Centennial court the court held that this direct duty of good faith imposes on a primary insurer an obligation to notify an excess carrier, when known, if it reasonably appears that exposure may exceed the primary limit. Id. at 1246. In reaching this conclusion, the court analyzed and gave strong consideration to the Guiding Principles for Primary and Excess Insurance Companies ("Principles"), a set of guidelines promulgated by the insurance industry in 1974.

The ultimate holding in the April Opinion was based in substantial part on American Centennial:

> This court concludes that American Centennial is persuasive. While Pennsylvania courts have not endorsed the concept of direct primary/excess insurer duties expressly, they have shown concern regarding the skewed relationship between the primary and the excess insurance carrier. See, e.g., Physicians Ins. Co., 167 Pa. Commw. at 500, 648 A.2d at 616 (noting that "[t]he insurance industry has long recognized the unsatisfactory nature of the relationship between primary and excess carriers"); F.B. Washburn Candy Corp., 373 Pa. Super. at 485, 541 A.2d at 774 (noting the conflict of interest between a primary and an excess insurer). This imbalance is not rectified if the excess insurer is limited to claims based on equitable subrogation.
>
> Moreover, the rationale supporting this theory is sound. Among the primary insurer, the excess insurer and the insured, only the primary insurer has both the information concerning the claim and the expertise necessary to evaluate that information and to determine if the excess policy is likely to be implicated. As the American Centennial court astutely noted, in the absence of a direct duty, the excess insurer's risk will increase, leading to a corresponding rise in excess insurance premiums. Cf. Physicians Ins. Co., 167 Pa. Commw. at 500, 648 A.2d at 616 (noting that, "[b]ecause of its less frequent exposure, the excess carrier generally charges lower premiums"). Accordingly, Pennsylvania law supports and is best served by the principle that a primary insurer that is aware of an excess policy bears the responsibility for notifying the excess insurer that its policy may be implicated.

53 Pa. D. & C.4th at 489-91 (footnotes omitted).

Liberty initially contends that, under the facts exposed in discovery, it did not owe a direct duty to notify American of the Voiro Action. This conclusion is based on a number of factors, including the alleged irrelevance of American Centennial and the Guiding Principles, and instructions in the various Policy documents regarding notice to excess insurers.

Liberty first asserts that American Centennial is not binding or persuasive for two primary reasons. Unlike the parties in American Centennial, neither Liberty nor American is a signatory to the Guiding Principles. In addition, the American Centennial court focused on the primary insurer as being more knowledgeable than the insured, while Liberty has produced evidence to show that Anderson was kept informed of all developments in the Voiro Action. While American concedes that neither it nor Liberty has signed the Guiding Principles, the comparative knowledge of Liberty and Anderson is not something that the court is comfortable resolving on a motion for summary judgment. Accordingly, the distinctions Liberty has drawn between the instant case and American Centennial are not controlling.

To the extent that the Court relied on the Guiding Principles as separate from American Centennial, Liberty argues that they are neither binding nor relevant. As mentioned supra, neither Liberty nor American was a party to the Guiding Principles. However, "[f]or the most part, the Guiding Principles relating to the primary insurer's conduct reflect the present state of the law in most jurisdictions." Michael M. Marick, Excess Insurance: An Overview of General Principles and Current Issues, 24 Tort & Ins. L.J. 715, 741 (1989). See also United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320, 1324-25 (E.D.N.C. 1990) (finding that the Principles "set forth the general standards of insurance practice"); General Acc. Ins. Co. v. New York Marine & Gen. Ins. Co., 727 A.2d 1050, 1054-55 (N.J. Super. Ct. App. Div. 1999) ("[T]he duty owed an excess carrier from a primary carrier is identical to that owed to the insured" and "is established by industry custom."). This gives the Guiding Principles a potential relevance independent of American Centennial and the Parties' accession thereto. In the absence of evidence that the Guiding Principles do not reflect the prevailing sentiment in the insurance world, the court is hesitant to discount them so readily.

Liberty points out that in Baen v. Farmers Mutual Fire Insurance Co., 723 A.2d 636 (N.J. Super. Ct. App. Div. 1999), the court found the Guiding Principles unpersuasive because there was no evidence that the relevant insurers had agreed to them. Id. at 642-43. However, this has not consistently been the case. In United States Fire Insurance Co., for example, the district court found the Guiding Principles binding on the defendant even though it had not signed them. 735 F. Supp. at 1324-25. Moreover, in a case that followed Baen, the New Jersey Superior Court held that the duty that flows to an excess carrier from a primary carrier "is established by industry custom." General Acc. Ins. Co. v. New York Marine & Gen. Ins. Co., 727 A.2d 1050, 1054-55 (N.J. Super. Ct. App. Div. 1999). Thus, the Guiding Principles may apply to the instant dispute even if American and Liberty did not sign them.

Where American's claims falter is in the language of the agreements among the various policies. Liberty points to the special servicing instructions ("Instructions") connected with the Liberty Policy that required Liberty to contact COLAS, not American, regarding excess notification requirements and not to send excess notification letters to any excess carrier. There is little doubt that Liberty complied with the Instructions, as the record is replete with evidence that Liberty contacted COLAS regarding excess insurance several times, beginning in October 1997, and suggested alerting American. This, Liberty argues, relieves it of any direct notification obligations it could potentially have had.

The Court is uncertain that this alone would be sufficient to relieve Liberty of the duty of notification it owed to American. However, this assignment of responsibility is confirmed in the American Policy. The Conditions section of the American Policy states that:

> 2. Whenever it appears that an occurrence, claim or "suit" is likely to involve this policy:
>
> a. You must see to it that we are notified promptly of an "occurrence."

Def. Ex. E Umbrella IV.C.1 (emphasis added). "You" is defined as "the Named Insured shown in the Declaration," i.e., COLAS, Inc. Def. Ex. E Umbrella Preamble. This imposes the duty of notification on COLAS and implies American's consent in the reassignment of Liberty's duty of notification. As such, there is sufficient evidence that Liberty's obligations are pinned on Anderson and that American cannot maintain a claim against Liberty based on a direct duty of notification.

Likewise, the primary insurer subrogation theory set forth in Sequoia Insurance Co. v. Royal Insurance Co., 971 F.2d 1385 (9th Cir. 1992), is inapplicable here. Under the primary insurer subrogation theory, "a primary insurer is, in effect, subrogated to the insured's claims and thus assumes the insured's obligation to notify the excess carrier according to the terms of the excess policy." United States Fire, 53 Pa. D. & C.4th at 493 (citing Sequoia Insurance Co.). However, as Liberty correctly points out, courts typically apply this theory when it is invoked by an excess insurer as a defense to a primary insurer's equitable subrogation claim. See, e.g., Sequoia Insurance Co. Because Liberty has not stepped into Anderson's shoes to assert a claim against American, it would be improper to allow the primary insurer subrogation theory as a sword when it is meant to function as a shield. Thus, Liberty's Motion must be granted.

II. American Is Entitled to Summary Judgment Against U.S. Fire

As a counterpart to Liberty's Motion, American has filed a motion for summary judgment ("American's Motion"), which demands summary judgment on U.S. Fire's claims against it. American claims that, regardless of who was responsible for providing notice of the Voiro Action, the late notice prejudiced it as a matter of law. As a secondary argument, American asserts that coverage under the American Policy was never triggered and that it therefore has no coverage or payment obligations.

1. American Has Failed to Show That It Suffered Prejudice from the Delayed Notice. Thus, It Was Not Entitled to Reject Voiro Action Coverage as a Matter of Law.

As set forth in Brakeman v. Potomac Insurance Co., 472 Pa. 66, 371 A.2d 193 (1977), Pennsylvania employs a two-prong test to determine whether late notice permits an insurance company to reject an otherwise legitimate claim:

> [W]e are of the opinion that the law established by our prior decisions relative to the effect of a clause in a liability insurance policy requiring the giving of notice of accident to the insurance company "as soon as practicable" has been too restrictive and should be changed. We therefore hold that where an insurance company seeks to be relieved of its obligations under a liability insurance policy on the ground of late notice, the insurance company will be required to prove that the notice provision was in fact breached and that the breach resulted in prejudice to its position.

472 Pa. at 76-77, 371 A.2d at 198 (emphasis added). Courts have applied this test to the conduct of primary and excess insurers alike. See, e.g., Trustees of the Univ. of Pa. v. Lexington Ins. Co., 815 F.2d 890, 898 (3d Cir. 1987) (extending Brakeman rule to insurance policies between sophisticated parties). Thus, American must show that the notice provision was breached and that it suffered prejudice as a result of the breach.

The notice provision in the American Policy requires COLAS to notify American "promptly" of an occurrence "[w]henever it appears that an occurrence, claim or 'suit' is likely to involve" the American Policy." Def. Ex. E Umbrella IV.C.1. However, American did not receive the requisite "prompt" notice. The evidence shows a delay of no less than six months between the realization that excess insurance coverage was implicated and notification of American. This, along with other events established by American, is sufficient to establish a breach of the notification provision.

It is more difficult for American to show prejudice in the context of a motion for summary judgment. In general, "[w]hether and under what circumstances prejudice can be granted as a matter of law is a contested issue in Pennsylvania." Hyde Athletic Indus., Inc. v. Continental Cas. Co., 969 F. Supp. 289, 300 (E.D. Pa. 1997) (citations omitted). American first argues that "prejudice exists as a matter of law where notice is first given when the insured's liability is a fait accompli." Def. Mem. 6 (citing United Nat'l

Ins. Co. v. Admiral Ins. Co., Civ. No. 90-6725, 1992 WL 210000, (E.D. Pa. Aug. 19, 1992)). However, each of the first set of cases American cites involves more than merely late notice and deals with a situation where the underlying action was settled prior to notifying the excess insurer. See, e.g., United Nat'l Ins. Co., 1992 WL 210000, at *6 (holding that excess insurer was prejudiced as a matter of law where it did not receive notice of claim after the liability of insured had been determined by settlement); Clemente v. Home Ins. Co., 791 F. Supp. 118 (E.D. Pa. 1992) (holding that excess insurer was prejudiced as a matter of law when it did not receive notice until three months after suit was settled).

American's focus on Metal Bank of America, Inc. v. Insurance Co. of North America, 360 Pa. Super. 350, 520 A.2d 493 (1987), is equally inappropriate. There, the initial notice to the insurer was accompanied by a description of a settlement arrangement that had been all but consummated, thus depriving the insurer of its right to participate in meaningful settlement discussions. In the instant case, U.S. Fire asserts that American received notice of the Voiro Action as early as September 3, 1998, but chose not to participate in settlement discussions in October and November 1998. Pl. Mem. 5-6. American's decision not to involve itself in these discussions, if established, would be sufficient to distinguish this case from Metal Bank. Similarly, Hyde Athletic Industries, Inc. is distinguishable because the insurer did not receive notice until after settlement negotiations failed and the trial had begun. See also Champion v. Chandler, Civ. No. 96-CV-7263, 1999 WL 820460 (E.D. Pa. Sept. 29, 1999) (finding prejudice as a matter of law where default judgment had already been entered against the insured).[7]

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[7] American also cites Greyhound Corp. v. Excess Insurance Co., 233 F.2d 630 (5th Cir. 1956). In Greyhound Corp., the court focused on the fact that the notice to the insurer came less than four weeks before trial was to begin and did not allow the insurer adequate investigation and decision making time. Even if the Court were to treat Greyhound Corp. as binding, American has failed to

American's claim that it suffered prejudice as a matter of law is further undermined by the circumstances of this case, as U.S. Fire lays them out. U.S. Fire alleges that American's claims adjuster did not even begin his investigation until one month after receiving notice. Pl. Ex. I 82-83. American then failed to attend several key meetings and conferences in the Voiro Action, and refused the settlement conference judge's offer to delay trial one month to give American more time to investigate. Pl. Mem. 6; Pl. Ex. I 139-40; Ex. N. Moreover, U.S. Fire's expert states that American handled the Voiro Action improperly and "was not prejudiced by any delay in the notice of this claim in their ability to investigate the facts and circumstances of this claim or to evaluate the liability of their insured." Pl. Ex. O 1. Accordingly, the Court will not grant American summary judgment based on lack of notice and resulting prejudice.

2. American Has Demonstrated the Inapplicability of the American Policy to the Voiro Action.

American next argues that the American Policy was never triggered because the coverage available under the Liberty Policy was never exhausted. Because it had no obligation that could be covered, American asserts, U.S. Fire may not invoke the doctrine of equitable subrogation. U.S. Fire supplies no convincing response to this argument, requiring that American's Motion be granted.

Under Pennsylvania law, an excess insurer may be treated as the insured's subrogee through the doctrine of equitable subrogation. This equitable doctrine is "a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another."

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adduce evidence to establish that the time between the notice and the scheduled Voiro Action trial date was insufficient and prejudiced it as a matter of law.

High-Tech-Enters., Inc. v. General Accident Ins. Co., 430 Pa. Super. 605, 609, 430 A.2d 639, 642 (1993) (citation omitted). To sustain a claim based on equitable subrogation, the excess insurer cum subrogee must establish five elements:

> (1) The claimant paid the creditor to protect its own interests;
> (2) The claimant did not act as a volunteer;
> (3) The claimant was not primarily liable for the debt;
> (4) The entire debt has been satisfied; and
> (5) Allowing subrogation will not cause injustice to the rights of others.

Tudor Dev. Group Inc. v. United States Fidelity & Guar. Co., 968 F.2d 357, 361 (3d Cir. 1992) (citing United States Fidelity & Guar. Co. v. United Penn Bank, 362 Pa. Super. 440, 524 A.2d 958 (1987)). Implicit in this test is the assumption that there is a debt that must be covered.

American first asserts that U.S. Fire was not acting to cover American's obligation in the Voiro Action because the American Policy was never triggered and American therefore had no debt to be satisfied. The Subcontract obligated I.A. Construction to secure $1 million in commercial general liability personal injury insurance, and the Liberty Policy limits coverage to "the limits of insurance required by the written agreement, but in no events exceeds either the scope of coverage or the limits of insurance provided by" the Liberty Policy. Pl. Ex. D at LM USFIRE 0000087. Although Liberty's contribution to the Voiro Action settlement totaled $2 million, i.e., the full amount of the Liberty Policy, American argues that any amounts exceeding $1 million were not required by the Liberty Policy. Because the limits of the Liberty Policy were not **properly** fully exhausted, it concludes, the American Policy, which provided coverage once the limits of the Liberty Policy had been reached, was never implicated.[8]

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[8] American's digression into whether Liberty acted as a volunteer misses the point. The proper question is not whether the underlying insurer contributed to a settlement voluntarily, but rather whether

Ultimately, the Court agrees with American. There is no indication that Liberty had any obligation to pay more than $1 million toward the Voiro Action settlement. Liberty's own documents and the testimony of Liberty's own employees bears this out. Although Liberty directed that Anderson was entitled to $2 million in coverage, Liberty has supplied no basis or reasoning for this decision. Def. Ex. LL 92-93, 97.

Because the $2 million limit of the Liberty Policy was never reached, American's obligations under the American Policy, an excess insurance policy, were never implicated:

> [E]xcess insurers are not liable merely because of the occurrence of an injury within the scope of the policy. Instead, an excess insurer's liability arises (or is "triggered") only after the insured has exhausted the limits of its primary insurance. Occidental Fire and Cas. Co. of North Carolina v. Brocious, 772 F.2d 47, 54 (3d Cir.1985). In other words, unlike the primary insurer, there is a condition precedent to the excess insurer's liability, i.e., the exhaustion of the primary insurance. Thus, in order to prevail on this issue, the plaintiff must establish that it has exhausted the limits of each of the primary policies which were in effect . . . before this Court can hold that each of the excess policies have been "triggered".

General Refractories Co. v. Allstate Ins. Co., Civ. No. 89-7924, 1994 WL 246375, at *4 (E.D. Pa. June 8, 1994). Accordingly, American had no coverage obligation and thus can owe no debt to U.S. Fire.

U.S. Fire's response to this claim is unpersuasive. Essentially, U.S. Fire argues that Liberty acted pursuant to the Blanket Additional Insured provision in the Liberty Policy that defined an "insured" as encompassing an entity "for whom you have agreed to provide liability insurance." Pl. Ex. F. U.S. Fire

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the subrogee, in this case U.S. Fire, acted as a volunteer. See also High-Tech-Enters., Inc., 430 Pa. Super. at 610, 635 A.2d at 642 ("The doctrine of subrogation will not be invoked to protect mere volunteers."); United States Fidelity & Guar. Co., 362 Pa. Super. at 451, 524 A.2d at 963 ("The equitable doctrine of subrogation is grounded in the principle that, when one, not a volunteer, pursuant to an obligation, fulfills the duties of another, he is entitled to assert the rights of that other against a third party.").

then submits that, because Anderson acted pursuant to the Blanket Additional Insured provision, it was entitled to the full $2 million Liberty Policy coverage.[9] The court questions the wisdom of this approach. There is little doubt that the $1 million insurance obligation in the Subcontract, combined with the provision in the Liberty Policy limiting coverage to that amount, could insulate Liberty from damages in excess of $1 million. To extend coverage up to $2 million would, in effect, ignore the contractual provisions bargained for by the parties. This the court should not do. Based on this reasoning, the court concludes that American is entitled to summary judgment on U.S. Fire's claim against it.[10]

CONCLUSION

Because American, Anderson and Liberty's contractual dealings effectively eliminated Liberty's direct duty to notify American of the Voiro Action, Liberty's Motion is granted, and the claim against them is dismissed.

Similarly, U.S. Fire has failed to demonstrate how the Liberty Policy's coverage was properly exhausted and how the American Policy was implicated. In the absence of a convincing argument in this regard, the court must grant American's Motion and enter summary judgment against U.S. Fire on its claim.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.

[9] Notably, U.S. Fire does not propose that the limit of the Liberty Policy as applied to Anderson was $1 million and that Liberty's payment of this amount in connection with the Voiro Action settlement exhausted the limits of the Liberty Policy. The court will refrain from considering this potentially persuasive argument sua sponte.

[10] In the event that U.S. Fire has additional reasons to support the continued prosecution of it claim, the court would be willing to entertain a motion for reconsideration.