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United States District Court,
N.D. Mississippi,
Delta Division.

EMJ CORPORATION and Westchester Fire Insurance Company, Plaintiffs
v.
HUDSON SPECIALTY INSURANCE COMPANY, Defendant.

Civil Action No. 2:11–cv–00228–GHD–JMV. | Signed March 11, 2015.

Synopsis

Background: Commercial liability **insurer** for general contractor brought action against commercial liability **insurer** for subcontractor, seeking a declaratory judgment that it was entitled to contribution from subcontractor's **insurer** for the amount it paid as part of a settlement for personal injuries sustained by inspector while working on general contractor's project. The District Court entered jury verdict in favor of general contractor's **insurer**, and subcontractor's **insurer** moved for a judgment notwithstanding the verdict.

Holdings: The District Court, Len H. Davidson, Senior District Judge, held that:

[1] both **insurers** provided excess umbrella **coverage** for injuries sustained by inspector, and

[2] liability for the settlement would be **prorated** between the two **policies**.

Motion granted in part and denied in part.

West Headnotes (18)

[1] Federal Civil Procedure
Relief from Judgment

In reconsidering its judgment pursuant to rule permitting motions to alter or amend a judgment, the district court reconsiders matters properly encompassed in its decision on the merits. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

Cases that cite this headnote

[2] Federal Civil Procedure
Grounds

A district court has discretion to grant a new trial when it is necessary to do so to prevent an injustice. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

Cases that cite this headnote

[3] Federal Civil Procedure
Grounds
Federal Civil Procedure
Weight of evidence
Federal Civil Procedure
Excessive Damages

Although rule permitting a district court to grant a new trial does not state appropriate grounds for a new trial, a new trial may be appropriate if the verdict is against the weight of the evidence, the amount awarded is excessive, or the trial was unfair or marred by prejudicial error. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

Cases that cite this headnote

[4] Federal Civil Procedure
Grounds
Federal Civil Procedure
Trial Errors
Federal Civil Procedure
Presumptions; construction of evidence

District courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the **party** seeking the new trial. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

Cases that cite this headnote

[5] Contribution

Nature and grounds of obligation

Contribution under Mississippi law is purely an equitable remedy; its aim is the prevention of injustice, pure and simple.

Cases that cite this headnote

[6] **Contribution**

Payment or discharge of common liability

Under Mississippi law, one who is compelled to satisfy, or pay more than his just share of a common burden or obligation, is entitled to contribution from the others to obtain from them payment of their respective shares.

Cases that cite this headnote

[7] **Insurance**

Policies considered as contracts

Insurance

Application of rules of contract construction

An insurance **policy** under Mississippi law is a contract between the **insurer** and the insured, with the rights and duties set out by the provisions of the insurance **policy**; as such, an insurance **policy** is a contract subject to the general rules of contract interpretation.

Cases that cite this headnote

[8] **Insurance**

Construction as a whole

Insurance

Matters extrinsic to **policies** in general

Under Mississippi law, the construction of an insurance contract is limited to examining the **policy**; a **policy** must be considered as a whole, with all relevant clauses together.

Cases that cite this headnote

[9] **Insurance**

Function of, and limitations on, courts, in general

No rule of construction requires or permits Mississippi courts to make a contract **differing** from that made by the **parties** themselves, or to enlarge an insurance company's obligations where the provisions of its **policy** are clear.

Cases that cite this headnote

[10] **Evidence**

Grounds for admission of extrinsic evidence

Insurance

Intention

Under Mississippi law, an insurance **policy** itself is the sole manifestation of the **parties**' intent, and no extrinsic evidence is permitted absent a finding by a court that the language is ambiguous and cannot be understood from a reading of the **policy** as a whole.

Cases that cite this headnote

[11] **Insurance**

Ambiguity in general

Ambiguity in an insurance contract under Mississippi law arises when a term or provision is susceptible to more than one reasonable meaning, but can also result from internal conflict between **policy** provisions that renders uncertain the meaning of the **policy** as a whole.

Cases that cite this headnote

[12] **Insurance**

Primary and excess insurance

Under Mississippi law, a subcontractor agreement or certificate of liability insurance was determinative of the priority of the **coverage** afforded to additional insureds under an insurance **policy** only if the insurance **policy**, like the subcontract agreement or certificate of liability insurance, contained a provision defining the priority of the **coverage** provided to additional insureds by reference to the requirements of the subcontract agreement.

Cases that cite this headnote

[13] **Insurance**

Scope of **coverage**

Under Mississippi law, an umbrella insurance **policy** that is truly excess incurs liability only after the exhaustion of a primary **policy**.

Cases that cite this headnote

[14] Insurance

Excess and Umbrella Liability **Coverage**

Insurance

Scope of **coverage**

Under Mississippi law, umbrella insurance **policies** are "parasitic" in that they require that the insured maintain and exhaust an underlying primary **policy**.

Cases that cite this headnote

[15] Insurance

Excess and Umbrella Liability **Coverage**

Under Mississippi law, the secondary nature of umbrella insurance **coverage**, **covering** only catastrophic losses, is reflected in its premiums, which are ordinarily quite low.

Cases that cite this headnote

[16] Insurance

Primary and excess insurance

Commercial liability **insurer** for general contractor and commercial liability **insurer** for subcontractor both provided excess umbrella **coverage** for injuries sustained by inspector while working on general contractor's project under Mississippi law; general contractor was a named insured under general contractor's **policy** and an additional insured under subcontractor's **policy**, both **policies** had an "other insurance" provision, and both **policies** stated that they were excess against all other insurance **policies** except for those specifically purchased to apply in excess of those **policies**.

Cases that cite this headnote

[17] Insurance

By **policy** limits

Liability for $4,000,000 settlement, for injuries sustained by inspector while working on general contractor's project, under general contractor's excess umbrella commercial liability **policy** and subcontractor's excess umbrella commercial liability **policy** would be **prorated** between the two **policies** according to the **coverage** limits set forth in both **policies** under Mississippi law; both **policies** **covered** the same risk, on the same level, and had mirror-image excess clauses.

Cases that cite this headnote

[18] Insurance

By **policy** limits

Under Mississippi law, when there is a conflict in two liability insurance **policies** and the two **policies** are indistinguishable in meaning and intent, the liability under the two **policies** is **prorated** between the two insurance **policies** in the ratio of the limits of liability fixed in each **policy** which bears to the total limits in all of the **policies** **covering** the risk.

Cases that cite this headnote

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MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND DENYING PLAINTIFFS' MOTION FOR FURTHER RELIEF

LEN H. DAVIDSON, Senior District Judge.

***1** Presently before the Court are a motion for judgment notwithstanding the verdict or alternatively for new trial [168]

filed by Defendant Hudson Specialty Insurance Company, as well as a motion for further relief [165] filed by Plaintiffs EMJ Corporation and Westchester Fire Insurance Company. Upon due consideration, the Court finds that Defendant's motion for judgment notwithstanding the verdict or alternatively for new trial [168] should be granted in part and denied in part and Plaintiffs' motion for further relief [165] should be denied in its entirety, as set forth below.

A. Federal Rule of Civil Procedure 59 Standard

Both Defendant's motion for judgment notwithstanding the verdict or alternatively for a new trial [168], as well as Plaintiffs' motion for further relief [165], constitute motions to alter or amend the Court's judgment (and in Defendant's motion, alternatively, for a new trial) under Rule 59 of the Federal Rules of Civil Procedure. *See Komolafe v. Dewease*, 87 Fed.Appx. 385, 2004 WL 304198, at *1 (5th Cir.2004) (per curiam) (citing *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 n. 3 (5th Cir.1991) (post-judgment motion for new trial and/or for relief from judgment was properly considered under Rule 59 because it was filed within the requisite Rule 59 time period)); *see also Heck v. Triche*, 775 F.3d 265, 276–77 (5th Cir.2014) (citing *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 & n. 3, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) ("a postjudgment motion for discretionary *or mandatory* prejudgment **interest** is a Rule 59(e) motion")).

[1] "Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to 'mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment." *White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 450, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) (quoting Fed.R.Civ.P. 59 advisory committee's note on 1946 am., 5 F.R.D. 433, 476 (1946)). In reconsidering its judgment pursuant to Rule 59(e), the Court reconsiders matters properly encompassed in its decision on the merits. *See id.* at 451, 102 S.Ct. 1162. Rule 59(e) " 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.' " *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n. 5, 128 S.Ct. 2605, 171 L.Ed.2d 570 (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2810.1 (2d ed.1995) (footnotes omitted)).

[2] **[3]** **[4]** Besides allowing a court to alter or amend its judgment, Rule 59 further allows a court to "on motion, grant a new trial on all or some of the issues—and to any **party**—... after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court...." Fed.R.Civ.P. 59(a)(1)(A). "A district court has discretion to grant a new trial under Rule 59(a) of the Federal Rules of Civil Procedure when it is necessary to do so 'to prevent an injustice.' " *Jones v. Ruiz*, 478 Fed.Appx. 834, 835 (5th Cir.2012) (per curiam) (quoting *United States v. Flores*, 981 F.2d 231, 237 (5th Cir.1993)). Although Rule 59(a) does not state appropriate grounds for a new trial, "[a] new trial may be appropriate if the verdict is against the weight of the evidence, the amount awarded is excessive, or the trial was unfair or marred by prejudicial error." *Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir.1989) (citation omitted). "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the **party** seeking the new trial." *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir.1999).

B. Factual and Procedural Background

***2** On or about February 15, 2005, EMJ Corporation ("EMJ") and Contract Steel Construction, Inc. ("CSC") entered into a subcontractor agreement (the "Subcontract Agreement") for the execution of work on a JC Penney Project in Southaven, Mississippi (the "Project"). EMJ was the general contractor on the Project. CSC was the subcontractor, performing, in relevant part, the installation of a steel stairway, which was designed and constructed by another entity. With regard to requisite liability insurance **coverage**, the Subcontract Agreement provides in relevant part:

> [CSC] shall maintain, at its own cost, such insurance as will protect it and [EMJ] from ... any claim for bodily injury, ... both physical and loss of use, which may arise from the Work or any performance under the [s]ubcontract, whether such work or performance are by [CSC] or its officers, agents, subcontractors, suppliers, employees[,] or those with whom it controls for any part of the Work.... This indemnification shall

> only be applicable to the conduct attributable to [CSC] or anyone directly or indirectly employed, contracted[,] or supervised by [CSC] or by anyone for whose acts [CSC] may be liable.

Subcontract Agreement [1–1] at 2 ¶ 5. In accordance with the Subcontract Agreement, CSC took out insurance **policies**, including one from Hudson Specialty Insurance Company ("Hudson Specialty"), **Policy** No. CSPI–UM–00507 (the "Hudson **Policy**"). In relevant part, the Hudson **Policy** provides that an insured under the **policy** includes

> [a]ny person or organization for whom you [CSC] have agreed in writing prior to any "occurrence" or "offense" to provide insurance such as is afforded by this **policy**, but only with respect to operations performed by you [CSC] or on your behalf, or facilities owned or used by you [CSC].

Hudson **Policy** [1–4] at 22, § III(2)(f).

Thereafter, CSC installed a steel stairway at the Project and tendered the installation of the stairway to EMJ, which accepted it. Approximately two weeks later, JC Penney apparently engaged Professional Services Industries, Inc. to inspect an entrance canopy at the construction site. John Meeker, an employee of Professional Services Industries, Inc., was assigned the job. In the course of conducting the inspection, Meeker fell while descending the steel stairway previously installed by CSC. Meeker sustained injuries that rendered him a paraplegic.

On or about April 24, 2008, Meeker and his wife sued CSC, EMJ, and others in the Circuit Court of Desoto County in an action styled *John Meeker et al. v. J.C. Penney Corp., Inc., et al.*, Civil Action No. CV2008–0148, seeking damages for Meeker's personal injuries. Apparently, the claims asserted included allegations that the steps, as installed, were too steep to be safely navigated and lacked an anti-slip surface application. The state-court judge dismissed the claims by the Meekers against CSC, as well as a cross-claim by EMJ against CSC for indemnity. In his opinion, the state-court judge explained that under Mississippi law once a contractor or owner accepts the work of a subcontractor or contractor, liability for injuries related to the work accepted shifts to the **party** accepting the work, regardless of the subcontractor's negligent performance of the contract. Consequently, the state-court judge held that CSC owed no duty to Meeker and that only EMJ could owe such a duty to Meeker. The state-court judge further found that that the responsibility for applying a non-slip coating to the steps was outside the scope of CSC's contractual obligations; thus, CSC was found to have no liability to Meeker on that basis, as well. According to Plaintiffs, the Meekers' remaining allegation in the underlying state-court litigation was one for unspecified "independent" or "sole" negligence of EMJ. This Court notes that the state-court judge expressly reserved ruling on whether EMJ might nevertheless allocate fault to CSC at the state-court trial. After CSC was dismissed from the state-court case, the state-court judge stayed the proceeding pending EMJ's appeal of the state-court rulings to the Mississippi Court of Appeals. That court affirmed the state court's granting of summary judgment to CSC. *See EMJ Corp. v. Contract Steel Constr., Inc.*, 81 So.3d 295, 299–300 (Miss.Ct.App.2012). Subsequently, the Meekers' claims against EMJ were settled and the state case dismissed.

***3** The nature of the settlement is set forth in the stipulated facts of the Pretrial Order [145] and is summarized as follows. On October 21, 2012, the Meekers settled their claims against EMJ for the total amount of $5,000,000. Pretrial Order [145] at 9, ¶ 9(a)(14). Of the $5,000,000 settlement in the underlying state-court litigation, $1,000,000 was paid by Zurich American Insurance Company, under whose commercial liability insurance **policy** EMJ was a named insured, and $4,000,000 was paid by Westchester, under whose commercial umbrella liability **policy** EMJ was a named insured. *Id.* at 9–10, ¶ 9(a)(15). The Zurich American Insurance Company **policy** had a $1,000,000 per-occurrence limit. *Id.* at 9–10, ¶ 9(a)(16).

On November 28, 2011, Plaintiffs EMJ and Westchester Fire Insurance Company ("Westchester") (collectively, "Plaintiffs") filed this action for a declaratory judgment against Hudson Specialty in this Court.[1] Plaintiffs sought a declaration of the rights and obligations of all persons **interested** under the Hudson **Policy**, pursuant to Rule 57 of the Federal Rules of Civil Procedure; the United States Declaratory Judgment Act, 28 U.S.C. § 2201; and otherwise. Diversity jurisdiction existed in this case, as Plaintiffs and Hudson Specialty were completely diverse and the amount in controversy exceeded the jurisdictional threshold. The **parties** agreed that Mississippi law governed the action.

Plaintiffs sought a finding that EMJ was owed **coverage** as an additional insured under the Hudson **Policy** and that Hudson Specialty was the primary **insurer**, Hudson Specialty sought a determination that EMJ was not an additional insured under the Hudson **Policy** and that **coverage** did not exist under the Hudson **Policy**.

Trial commenced in the case *sub judice* on September 22, 2014. Due to the odd nature of this case, which presented several questions of law for the Court to answer, and only one question for the jury, the Court made detailed rulings which are incorporated herein by reference and made a part of this memorandum opinion. *See* Ct.'s Order Ruling on Matters of Law in the Case *Sub Judice* [157]. In sum, the Court ruled that the pertinent Hudson **Policy** provisions were ambiguous in part and unambiguous in part. Specifically, the Court held the following: (1) based on the clear terms of the "additional insured" provision, CSC agreed in writing (that is, in the Subcontract Agreement) to provide insurance, such as this afforded by the Hudson **Policy**, to EMJ; (2) Meeker's fall, which is the subject of this litigation, was a bodily injury constituting an "occurrence" as defined under the Hudson **Policy**; (3) "the writing" (the Subcontract Agreement) was entered into prior to the "occurrence" (Meeker's fall); and (4) the phrase "but only with respect to operations performed by you or on your behalf, or facilities owned or used by you" was ambiguous and presented a question for the jury that would determine whether **coverage** for Meeker's injury was precluded under the Hudson **Policy**. The Court further held as a matter of law that the judgment of the Circuit Court of Desoto County, Mississippi be afforded full faith and credit and read to the jury the statements of that judgment which were essential to the judgment and thus binding on the case *sub judice*. The Court further held as a matter of law that if the jury found that the phrase "with respect to operations performed by you or on your behalf or facilities owned or used by you" applied to the circumstances of this case, no named exclusion barred **coverage** for Meeker's accident. Subsequently, the jury returned a verdict that the phrase "with respect to operations performed by you or on your behalf or facilities owned or used by you" did apply, and thus, that **coverage** was available to EMJ under the Hudson **Policy** for Meeker's accident. The Court's next task was to determine the amount of **coverage** afforded by the Hudson **Policy** for Meeker's accident.

***4** As a threshold matter, the Court determined as a matter of law that Westchester paid the settlement in the underlying state-court litigation for Meeker's fall because it had a legal obligation to do so—not voluntarily—and that Westchester properly undertook the settlement. The Court further held that breach of duty or failure to settle within the **policy** limits was not at issue in this case, and that any claim that Hudson Specialty acted with bad faith in refusing to acknowledge EMJ's insured status was not supported by the proof. Finally, the Court held as a matter of law that based on the Hudson **Policy** terms, the Subcontract Agreement, and the Certificate of Liability Insurance issued by CSC to EMJ pursuant to the terms of the Subcontract Agreement, the Hudson **Policy** was a primary **policy** and the Westchester **Policy** was an excess **policy**, and as such, the Court ordered Hudson Specialty to fully reimburse Westchester for the $4,000,000 Westchester paid in settlement of the underlying state-court litigation.

These detailed rulings were necessarily expedited, given the curious posture of the case as a jury trial replete with legal questions and the **parties**' refusal to consent to a non-jury trial. The Court has used the opportunity provided by Rule 59 to carefully consider the **parties**' arguments and reexamine its rulings at trial and all authorities bearing on this matter. In so doing, the Court finds that its rulings were properly determined as a matter of law on the issue of **coverage** for EMJ under the Hudson **Policy**, but that the Court should reevaluate the amount of **coverage** available under the Hudson **Policy** and Westchester **Policy** for the subject accident.

C. Analysis and Discussion

Plaintiffs brought this declaratory judgment action, *inter alia*, to obtain a declaration from the Court that Westchester was entitled to contribution from Hudson Specialty for the amount Westchester paid on behalf of EMJ in the settlement of the underlying state-court litigation concerning Meeker's fall.

[5] **[6]** "Contribution is purely an equitable remedy. Its aim is the prevention of injustice, pure and simple." *Williams v. Owen*, 613 So.2d 829, 835 (Miss.1993) (citations omitted). "[O]ne who is compelled to satisfy, or pay more than his just share of such common burden or obligation, is entitled to contribution from the others to obtain from them payment of their respective shares." *Celotex Corp. v. Campbell Roofing & Metal Works, Inc.*, 352 So.2d 1316, 1318 (Miss.1977).

> Where one of two or more potentially liable **insurers** pays a loss, whether in satisfaction of a judgment or in

> settlement of a claim, it may then seek payment from the other **insurers** of their fair share of the loss.
>
> ...
>
> In the insurance context, the right to contribution among **insurers** arises in two basic circumstances: 1) an **insurer** of a joint tortfeasor has paid all, or greater than its share, of a loss; 2) a single insured is **covered** by concurrent or "double" insurance, and one **insurer** paid all, or greater than its share, of a loss.

***5** Steven Plitt, Daniel Maldonado, Joshua D. Rogers & Jordan R. Plitt, *Couch on Insurance* 3d § 217:4 (2014) (footnotes omitted). "In the context of multiple concurrent insurance, contribution is only appropriate where the **policies** insure the same entities, the same **interests** in the same property, and the same risks." *Id.*3d § 218:3 (2014) (footnotes omitted). "For **coverage** to be concurrent for purposes of contribution, it must be at the same level—primary to primary or excess to excess." *Am. Family Mut. Ins. Co. v. Regent Ins. Co.*, 288 Neb. 25, 846 N.W.2d 170, 193 (2014) (citing 2 Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds* § 7:4 (6th ed.2013)).

[7] [8] [9] [10] [11] An insurance **policy** is a contract between the **insurer** and the insured, with the rights and duties set out by the provisions of the insurance **policy**; as such, an insurance **policy** is a contract subject to the general rules of contract interpretation. *ACS Constr. Co. of Miss. v. CGU*, 332 F.3d 885, 888 (5th Cir.2003) (citing *Clark v. State Farm Mut. Auto. Ins. Co.*, 725 So.2d 779, 781 (Miss.1998)); *Haney v. Cont'l Cas. Co.*, No. 3:08cv482–DPJ–JCS, 2010 WL 235025, at *2 (S.D.Miss. Jan. 15, 2010) (citing *Sennett v. U.S. Fid. & Guar. Co.*, 757 So.2d 206, 212 (Miss.2000)); *Miss. Ins. Guar. Ass'n v. Blakeney*, 54 So.3d 203, 205 (Miss.2011). "Under Mississippi law, the construction of an insurance contract is limited to examining the **policy**." *Am. States Ins. Co. v. Natchez Steam Laundry*, 131 F.3d 551, 555 (5th Cir.1998) (citing *Emp'rs Mut. Cas. Co. v. Nosser*, 250 Miss. 542, 164 So.2d 426, 430 (1964)). "A **policy** must be considered as a whole, with all relevant clauses together." *U.S. Fid. & Guar. Co. v. Martin*, 998 So.2d 956, 963 (Miss.2008). " 'No rule of construction requires or permits [Mississippi courts] to make a contract **differing** from that made by the **parties** themselves, or to enlarge an insurance company's obligations where the provisions of its **policy** are clear.' " *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 429 (5th Cir.2007) (quoting *State Auto. Mut. Ins. Co. of Columbus v. Glover*, 253 Miss. 477, 176 So.2d 256, 258 (1965)). "The **policy** itself is the sole manifestation of the **parties**' intent, and no extrinsic evidence is permitted absent a finding by a court that the language is ambiguous and cannot be understood from a reading of the **policy** as a whole." *Am. States Ins. Co.*, 131 F.3d at 555 (citing *Great N. Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F.Supp. 401, 406 (N.D.Miss.1996)). "Ambiguity arises when a term or provision is susceptible to more than one reasonable meaning, but can also result from 'internal conflict' between **policy** provisions that renders uncertain the meaning of the **policy** as a whole." *Id.* (quoting *Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.2d 765, 769 (Miss.2005)).

The Court finds that the extent of **coverage** (including the Hudson **Policy's** priority vis-á-vis the Westchester **Policy**) can be determined by unambiguous **policy** terms and thus that the Court must not look to the terms of the underlying Subcontract Agreement that required the purchase of insurance **coverage** or to the Certificate of Liability Insurance to determine priority of **coverage**. *See Queen Ins. Co. of Am. v. Delta Gin Co.*, 210 Miss. 167, 48 So.2d 866, 867–68 (1950) ("[P]arol evidence cannot be admitted to alter or change the specific terms of an insurance **policy**, or to extend it so as to **cover** property not intended in the description, but it is admissible for the purpose of showing what property was intended to be described therein where such description is not absolutely clear from the language of the **policy**."). [2]

***6 [12]** An exception would be if the insurance **policy** itself expressly provided that the terms of the Subcontract Agreement would determine whether the **coverage** afforded was primary or excess. *See, e.g., Stout v. 1 E. 66th Street Corp.*, 28 Misc.3d 1201(A), 911 N.Y.S.2d 696 (Table), 2010 WL 2572655, at *24 (N.Y.Sup.Ct. June 28, 2010) (discussing case that "looked to the underlying subcontractor's insurance procurement provisions to determine whether the general contractor's **coverage** as an additional insured under the subcontractor's **policy** was primary or excess, because the insurance **policy** expressly provided that the terms of the subcontract would determine whether the additional insured **coverage** was primary or excess"). Thus, the Subcontract Agreement—or Certificate of Liability Insurance—would be determinative of the priority of the **coverage** afforded to additional insureds under the insurance **policy** *only if* the insurance **policy**, like the Subcontract Agreement (or Certificate of Liability Insurance), contained a provision defining the priority of the **coverage** provided to additional

insureds by reference to the requirements of the Subcontract Agreement.

The Hudson **Policy** does not define the priority of the **coverage** afforded to additional insureds by reference to the requirements of the underlying Subcontract Agreement or Certificate of Liability Insurance. In fact, the Hudson **Policy** explicitly provides: "This **policy** contains all the agreements between you and us concerning the insurance afforded," Hudson **Policy** [1–4] at 24, § V(4), thus stating the **policy** itself contained the full expression of the **parties**' intent with respect to **coverage**.

"Thus, the extent of **coverage** ... is controlled by the relevant **policy** terms, not by the terms of the underlying [Subcontract Agreement] that required the named insured to purchase **coverage**." *See Time Warner Cable of N.Y.C v. N.H. Ins. Co.*, 19 Misc.3d 1141(A), 866 N.Y.S.2d 96 (Table), 2008 WL 2279753, at *3 (N.Y.Sup.Ct. May 27, 2008). Accordingly, the Court must review and consider the relevant **policy** terms, including the "other insurance" provisions, to determine the extent of **coverage**. *See Am. Family Mut. Ins. Co.*, 846 N.W.2d at 193 (citing *Universal Underwriters v. CNA Ins.*, 308 N.J.Super. 415, 706 A.2d 217, 218 (1998)).

[13] [14] [15] The Westchester **Policy** per-occurrence **coverage** limit is $25,000,000, whereas the Hudson **Policy** per-occurrence **coverage** limit is $5,000,000. *See* Hudson **Policy** [1–4] at 1, Decls.; Westchester **Policy** [1–3] at 1, Decls. EMJ is the named insured under the Westchester **Policy** and is an additional insured under the Hudson **Policy**. Both the Hudson **Policy** and Westchester **Policy** are self-described commercial umbrella liability **policies** and excess **policies**. An umbrella **policy** that is truly excess incurs liability only after the exhaustion of a primary **policy**. *See Guidant Mut. Ins. Co. v. Indem. Ins. Co. of North Am.*, 13 So.3d 1270, 1279 (Miss.2009).[3] "[U]mbrella **policies** are 'parasitic' in that they require that the insured maintain and exhaust an underlying primary **policy**." *Dickau v. Vt. Mut. Ins. Co.*, 107 A.3d 621, 625–26 (Me.2014) (citing *Peerless Indem. Ins. Co. v. Frost*, 723 F.3d 12, 18 (1st Cir.2013); 15 Lee R. Russ & Thomas F. Segalia, *Couch on Insurance* 3d § 220:32 (2005 & Supp.2009)). "The secondary nature of umbrella **coverage**, **covering** only catastrophic losses, is reflected in its premiums, which are ordinarily quite low." *Id.*, at 626 (citing *Apodaca v. Allstate Ins. Co.*, 255 P.3d 1099, 1103 (Colo.2011); *Globe Indem. Co. v. Jordan*, 634 A.2d 1279, 1284 (Me.1993); *Trinity Universal Ins. Co. v. Metzger*, 360 So.2d 960, 962 (Ala.1978)); *accord Am. Family Mut. Ins. Co.*, 846 N.W.2d 170, 193–94.

***7** The Westchester **Policy** defines its "underlying insurance" as follows:

> [t]he **policies** listed in Schedule A—Schedule of Underlying Insurance and any other **policies** purchased or issued for any newly acquired or formed organization not more restrictive than the terms, conditions, endorsements, and limits of liability of the **policies** listed in Schedule A and to be maintained by you in accordance with Condition M of this **policy**.

Westchester **Policy** [1–3] at 50, § IV(M). The Westchester Schedule of Underlying Insurance states that the underlying commercial general liability insurance is by Zurich American Insurance Company for a per-occurrence limit of $1,000,000. *Id.* at 6, Schedule of Underlying Insurance.

The Hudson **Policy** provides in pertinent part: "We will pay on behalf of the insured that portion of the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' ... to which this insurance applies." Hudson **Policy** [1–4] at 14, § I, **Coverage** A(1)(a). The "when loss payable" provision states as follows:

> Our liability for any portion of "ultimate net loss" will not apply until the insured or any "underlying **insurer**" is obligated to actually pay the full and complete amount of the "retained limit." When "ultimate net loss" has been finally determined, the insured may make claim for payment under this **policy** as soon as practicable thereafter. Such insured[']s obligation to pay any amount of "ultimate net loss" must have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant or the claimants' legal representative and us.

Id. at 26, § V(18).

The Hudson **Policy** defines "ultimate net loss" in pertinent part as "the total amount of damages for which the insured is legally liable in payment of 'bodily injury.' " *Id.* at 29, § VI(20). The Hudson **Policy** defines "retained limit" in pertinent part as "[t]he sum of amounts applicable to any 'claim' or 'suit' from: '[u]nderlying insurance,' whether such 'underlying insurance' is collectible or not; ... and [o]ther collectible primary insurance[.]" *Id.*

The attached Hudson Schedule of Underlying Insurance references two insurance **policies**: Amerisure Commercial General Liability **Policy** No. CPP138489203005, which provided **coverage** for occurrence, products-completed operations, and personal and advertising injury, as well as Amerisure Automobile Liability **Policy** No. CA138489103005, which provided **coverage** for owned automobiles, non-owned automobiles, and hired automobiles. *Id.* at 12, Schedule of Underlying Insurance. Additionally, the Hudson **Policy** defines "underlying insurance" as "the **coverage**(s) afforded under insurance **policies** designated in Item 5 of the Declaration[s] and any renewals or replacements of those **policies**," and defines "underlying **insurer**" as "any company issuing any **policy** of 'underlying insurance.' " *Id.* at 29, § VI(25–26). The **policies** referenced in Item 5 of the Declarations are Amerisure Commercial General Liability **Policy** No. CPP138489200, which **covered** occurrence, products-completed operations, and personal and advertising injury, as well as Amerisure Automobile Liability **Policy** No. CA138489100, which **covered** owned automobiles, non-owned automobiles, and hired automobiles. *Id.* at 1, Decls.; 2, Schedule of Underlying Insurance. Thus, the "underlying insurance" referred to in the Hudson **Policy** are the aforementioned Amerisure commercial general liability **policies** and automobile liability **policies**. *See id.* at 19, § 1, **Coverage** B(1)(a)(3)(a).

***8** By the terms of the Hudson **Policy**, primary **coverage** must be exhausted before any excess **coverage** under the Hudson **Policy** may be accessible. *See Empire Indem. Ins. Co. v. N/S Corp.*, 571 Fed.Appx. 344, 349 (5th Cir.2014) (per curiam). The **parties** are apparently in agreement that the aforementioned Amerisure insurance **policies**—though clearly "underlying insurance" of the Hudson **Policy**—are not "applicable to any 'claim' or 'suit' " for purposes of the "retained limit." *See* Hudson **Policy** [1–4] at 29, § VI(20). Therefore, the Court examines whether Hudson **Policy** **coverage** is impacted by "[t]he sum of amounts applicable to any 'claim' or 'suit' from ... [o]ther collectible primary insurance[.]" *See* Hudson **Policy** [1–4] at 29, § VI(20). It is clear to this Court that "other collectible primary insurance" includes the Zurich American Insurance Company **policy**, which paid $1,000,000 toward the settlement of the underlying state-court litigation in exhaustion of its per-occurrence **policy** limit. Plaintiffs maintain that only the Zurich American Insurance Company **policy** was applicable other collectible primary insurance for purposes of the retained limit. Hudson Specialty argues that CSC and EMJ's other subcontractors were required to provide EMJ with certain primary insurance **coverage**, but that Plaintiffs never possessed or reviewed such **policies** and instead examined only EMJ's own **policies** and those of CSC. *See* Def.'s Mem. Br. Supp. Post–Trial Mot. [169] at 6–7. However, Hudson Specialty does not point to any other applicable collectible primary insurance and thus fails to rebut Plaintiffs' argument concerning collectible primary insurance. Accordingly, the Court finds that Hudson Specialty's argument in this respect is not well taken.

[16] The Court finds that when the Westchester **Policy** and the Hudson **Policy** are viewed side by side, they both provide **coverage** for Meeker's fall as excess umbrella **policies**, as detailed below. The Court can determine the right to contribution between these two **insurers** on the record before it. Accordingly, the Court must review and consider the relevant **policy** terms, and particularly, the "other insurance" provisions, to determine the extent of **coverage**. *See Am. Family Mut. Ins. Co.*, 846 N.W.2d at 193 (citing *Universal Underwriters*, 706 A.2d at 218 ("[W]here two carriers have responsibility for a claim, the other insurance clause of each **policy** must be examined to determine whether there exists language which may govern the contribution each **party** should make.")).

United States District Judge Tom S. Lee has succinctly set forth the basics of "other insurance" clauses under Mississippi law:

> Often, ... **policies** contain "other insurance" clauses which, generally speaking, are of three types: escape, excess[,] and prorata. Escape clauses provide that the **policy** affords no **coverage** at all when there is other valid and collectible insurance. Excess clauses provide that the **insurer's** liability shall be only the amount by which the loss exceeds the **coverage** of all other valid and collectible insurance, up to the limits of the

> excess **policy**. And prorata clauses provide that the **insurer** will pay its prorata share of the loss, usually in the proportion to which the limits of its **policy** bear to the aggregate limits of all valid and collectible insurance. The courts have refused to enforce conflicting "other insurance" clauses literally, because giving full effect to such clauses would allow both **insurers** to avoid liability altogether. *Travelers Indem. Co. v. Chappell*, 246 So.2d 498, 503 (Miss.1971). Rather, at least so long as the clauses are identical (or of the same type), the courts have held them to be conflicting and repugnant so as to cancel each other out, in which case the liability under the **policies** is **prorated** as it would be if neither **policy** addressed the "other insurance" situation. *Id.*

***9** *Farmers Ins. Exch. v. Hartford Cas. Ins. Co.*, 907 F.Supp. 234, 237 (S.D.Miss.1995).

The "other insurance" provision in the Westchester **Policy** is as follows:

> If there is any other collectible insurance available to the "Insured" (whether such insurance is stated to be primary, contributing, excess[,] or contingent) that **covers** a loss that is also **covered** by this **policy**, the insurance provided by this **policy** will apply in excess of, and shall not contribute with, such insurance. This Condition H does not apply to any insurance **policy** purchased specifically (and which is so specified in such insurance **policy**) to apply in excess of this **policy**.

Westchester **Policy** [1–3] at 54, Conditions(H).

The "other insurance" provision in the Hudson **Policy** states in pertinent part as follows:

> If other valid and collectible insurance is available to the insured for "ultimate n[e]t loss" we **cover** under this **policy**, our obligations under this **policy** is limited as follows:
>
> As this insurance is excess over any other insurance, whether primary, excess, contingent[,] or on any other basis, except such insurance as is specifically purchased to apply in excess of this **policy's** Limit of Insurance, we will pay only our share of the amount of "ultimate net loss," if any, that exceeds the sum of[ ](1)[t]he total amount that all such other insurance would pay for the loss in the absence of this insurance; and (2)[t]he total of all deductible and self-insured amounts under this or any other insurance.

Hudson **Policy** [1–4] at 25, § V(10)(a)(1)-(2).

By its terms, the Westchester **Policy** is excess against all other insurance **policies** "except such insurance as is specifically purchased to apply in excess of this **policy's** Limit of Insurance." *See id.* Courts have interpreted such language to refer to "a higher-level **policy** that specifically designates the subject **policy** as underlying insurance." *See Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140, 152, 855 N.Y.S.2d 459 (N.Y.App.Div.2008); *Nat'l Farmers Union Prop. & Cas. Co. v. Farm & City Ins. Co.*, 689 N.W.2d 619, 623 (S.D.2004); *Treder ex rel. Weigel v. LST, L.P.*, 271 Wis.2d 771, 679 N.W.2d 555, 561 (Wis.Ct.App.2004), *review denied* 273 Wis.2d 656, 684 N.W.2d 137 (Wis.2004); *Allstate Ins. Co. v. Frank B. Hall & Co.*, 770 P.2d 1342, 1347 (Colo.Ct.App.1989). Thus, by the plain language of the Westchester **Policy**, it is an excess **policy**, even with respect to another existing excess **policy**, unless that other existing excess **policy** specifically references the Westchester **Policy** and states that it is excess to the Westchester **Policy**. The Hudson **Policy** does not refer to the Westchester **Policy** by name. A reasonable construction of the Westchester **Policy** is that it is excess to the Hudson **Policy**.

The Hudson **Policy** specifically provides that it is excess against all other insurance **policies**, even excess insurance **policies**, unless the particular excess insurance **policy** "is specifically purchased to apply in excess of this **policy's** Limit of Insurance," in which case, "we will pay only our share of the amount of 'ultimate net loss,' if any,...." *See* Hudson **Policy** [1–4] at 25, § V(10)(a). By the plain language of the Hudson **Policy**, it is an excess **policy** even with respect to another existing excess **policy**, unless that other existing excess **policy** specifically references the Hudson **Policy** and states that it is excess to the Hudson **Policy**. The Westchester

Policy does not refer to the Hudson Policy by name. A reasonable construction of the Hudson Policy is that it is excess to the Westchester Policy. [4]

***10** Clearly, from the perspective of the insured, a "reasonable construction" of the two policies yields a conflict. Viewed from the perspective of the insured, the Hudson Policy provides coverage for the underlying suit if the Westchester Policy does not exist, and vice versa.

[17] The Hudson Policy and Westchester Policy were both designed to be true excess policies; by the clear policy terms, neither policy was designed to provide primary coverage. *See Caldwell Freight Lines, Inc. v. Lumbermens Mut. Cas. Co.*, 947 So.2d 948, 956–57 (Miss.2007); *Titan Indem. Co. v. Estes*, 825 So.2d 651, 655, 657, 658 (Miss.2002). *See also Markel Am. Ins. Co. v. Travelers Cas. & Sur. Co.*, 2010 WL 2732881, at *5, *6 (S.D.Ind. July 7, 2010); *Bovis Lend Lease LMB, Inc.*, 53 A.D.3d at 155, 855 N.Y.S.2d 459. Since both Westchester and Hudson Specialty have contracted to cover the same risk on the same level and have employed essentially mirror-image excess clauses in their respective "other insurance" clauses, the excess coverage clauses are deemed to cancel each other out and each carrier is required to contribute ratably in such proportion as its policy limit bears to the total of all policy limits at the same level. *See Bovis Lend Lease LMB, Inc.*, 53 A.D.3d at 155–56, 855 N.Y.S.2d 459.

[18] The interaction of two policies containing excess insurance clauses creates circularity and could provide a windfall to whichever insurer's policy is read first. The Mississippi Supreme Court has explained:

> The view most often accepted is to the effect that when there is a conflict in the policies, escape v. escape, escape v. excess or excess v. excess, the two policies are indistinguishable in meaning and intent, (and therefore) one cannot rationally choose between them and must, therefore, be held to be mutually repugnant and must be disregarded.

Travelers Indem. Co., 246 So.2d at 504 (citing cases) (quotation marks and citations omitted). "When such is the case, the liability under the two policies is 'prorated between the two insurance policies in the ratio of the limits of liability fixed in each policy which bears to the total limits in all of the policies covering the risk.' " *Cont'l Cas. Co. v. Coregis Ins. Co.*, 213 F.Supp.2d 673, 679 (S.D.Miss.2002) (quoting *Blue Cross & Blue Shield of Miss., Inc. v. Larson*, 485 So.2d 1071, 1073 (Miss.1986) (citing *Travelers*, 246 So.2d at 503)).

The Westchester Policy requires Westchester to pay

> on behalf of the "Insured" those sums in excess of the "Retained Limit" which the "Insured" by reason of liability imposed by law, or assumed by the "Insured" under contract prior to the "Occurrence," shall become legally obligated to pay as damages for: "Bodily Injury" ... arising out of an "Occurrence" during the

Westchester Policy [1–3] at 47, § I(1)(a).

The Westchester Policy further provides:

> "Retained Limit" means whichever of the following is applicable:
>
> (1) with respect to any "Occurrence" that is covered by "Underlying Insurance" or any other insurance, the total of the applicable limits of the "Underlying Insurance" plus the applicable limits of any other insurance; or
>
> ***11** (2) with respect to any "Occurrence" that is not covered by "Underlying Insurance" or any other insurance, the amount of the Self–Insured Retention stated in Item 4(e) of the Declarations

Id. at 50, § IV, ¶ K.

The Westchester Policy additionally provides: "The 'Limits of Insurance' shown in the Declarations and the rules below fix the most we will pay...." *Id.* at 47, § I(2). The Declarations, as well as the rules stated in Section V, Limits of Insurance, provide that Westchester will pay a per-occurrence limit of $25,000,000 and a general aggregate limit of $25,000,000. *Id.* at 1, Decls.; 51, § V.

The Hudson Policy requires Hudson Specialty to pay "on behalf of the insured that portion of the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' ... to which this insurance applies." Hudson Policy [1–4] at 14, § I, Coverage A(1)(a). The Hudson Policy defines "ultimate net loss" in pertinent part as follows:

> [t]he total amount of damages for which the insured is legally liable in payment of "bodily injury".... "Ultimate net loss" must be fully determined as shown in Condition 18. —When Loss Payable. "Ultimate net loss" will be reduced by any recoveries or salvages which have been paid or will be collected, but the amount of "ultimate net loss" will not include any expenses incurred by any insured, by us or by any "underlying **insurer**." However, if the limits of liability of any "underlying insurance" applicable to a "claim" or "suit" to which this insurance applies are reduced or exhausted by the payment of expenses then "ultimate net loss" includes all expenses incurred by us which are allocated to the "claim" or file and such expenses of the "underlying **insurer**." "Ultimate net loss" does not include any expenses incurred by any "insured."

Id. at 29, § VI(24).

The Hudson **Policy** defines "retained limit" in pertinent part as follows:

> [t]he greater of:
>
> The sum of amounts applicable to any "claim" or "suit" from:
>
> [1] "[u]nderlying insurance," whether such "underlying insurance" is collectible or not; or
>
> [2] "[o]ther collectible primary insurance[.]"

Id. at 29, § VI(20).

The Hudson **Policy** further provides: "This **policy** does not afford such person or organization limits of insurance in excess of the lesser of: (1)[t]he minimum limit of insurance you agreed to provide; or (2)[t]he limit of insurance under this **policy**." *Id.*, § III(2)(f)(1)–(2)The **policy** limits the amount Hudson Specialty will pay for "ultimate net loss" to that described in Section IV, which provides in pertinent part: "The limits of insurance shown in Item 4 of the Declarations and the rules below fix the most we will pay...." *Id.* at 14, § I, **Coverage** A(1)(a); 23, § IV(1). Item 4 of the Declarations provides a per-occurrence limit of $5,000,000 and a **policy** aggregate limit of $5,000,000. *Id.* at 1, Decls. Section IV further provides in pertinent part: "The **Policy** Aggregate Limit stated in Item 4 of the Declarations is the most we will pay for all 'ultimate net loss' under **Coverage** A and **Coverage** B combined ...." and "the Each Occurrence Limit stated in Item 4 of the Declarations is the most we will pay for all 'ultimate net loss' because of injury and damage arising out of each 'occurrence.' " *Id.* at 23, § IV(2)(a), (c). The Hudson **Policy** further provides:

> ***12** Our liability for any portion of "ultimate net loss" will not apply until the insured or any "underlying **insurer**" is obligated to actually pay the full and complete amount of the "retained limit." When "ultimate net loss" has been finally determined, the insured may make claim for payment under this **policy** as soon as practicable thereafter. Such insured[']s obligation to pay any amount of "ultimate net loss" must have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant[,] or the claimants' legal representative and us.

Id. at 26, § V(18).

Because both the Westchester **Policy** and the Hudson **Policy** are true excess **policies**, each **insurer** owes its share pursuant to the umbrella/excess **coverage** language of its respective **policy**. As the excess **insurer**, Westchester paid $4,000,000 in settlement in the underlying state-court litigation. The Westchester **Policy** provides $25,000,000 per-occurrence excess **coverage**; the Hudson **Policy** provides $5,000,000 per-occurrence excess **coverage**. Of the total $30,000,000 excess **coverage** available under the two **policies**, Hudson Specialty has one-sixth of the obligation to pay the $4,000,000; Westchester has five-sixths of the obligation to pay the $4,000,000. Accordingly, Hudson Specialty must now pay to Westchester $666,666.67. [5]

Plaintiffs' Motion for Further Relief

Briefly, the Court addresses the motion for pre-judgment **interest** [165] filed by Plaintiffs. Although Plaintiffs requested pre-judgment **interest** in their prayer for relief in the complaint [1] and again reiterated this request at the close of trial in this cause, Plaintiffs failed to request pre-judgment **interest** in the Pretrial Order [145]. The Court is of the opinion that this request is not well taken and that prejudgment **interest** should not be awarded in this case.

D. Conclusion

In sum, the Court finds that Defendant Hudson Specialty Insurance Company's motion for judgment notwithstanding the verdict or alternatively for new trial [168] should be GRANTED IN PART AND DENIED IN PART. Specifically, judgment should be entered in favor of Plaintiffs EMJ Corporation and Westchester Fire Insurance Company against Defendant Hudson Specialty Insurance Company in the amount of $666,666.67 plus post-judgment **interest** at the rate of 0.25% and costs.

The Court additionally finds that Plaintiffs' motion for further relief [165] should be DENIED in its entirety.

An order and final judgment in accordance with this opinion shall issue this day.

Footnotes

1 Amerisure Mutual Insurance Company was also originally named as a defendant, but was subsequently terminated from the case per the mutual agreement of the **parties**.

2 The Court notes that this is in contrast to its earlier ruling that the extent of **coverage** was controlled by relevant **policy** terms, as well as the terms of the Subcontract Agreement and Certificate of Liability Insurance CSC issued to EMJ. For the reasons stated above, the Court finds that that ruling must be revised accordingly. However, even if the Certificate of Liability Insurance could be properly considered in the **coverage** determination, that Certificate states that it is "issued as a matter of information only and confers no rights upon the certificate holder" and

> does not amend, extend[,] or alter the **coverage** afforded by the **policies** below.
> **Insurers** Affording **Coverage**;
> **Insurer** A: Amerisure Insurance Company
> **Insurer** B: A G C W C T
> **Insurer** C: St. Paul Insurance Company
> **Insurer** D: Hudson Specialty Ins[urance] Company

Certificate of Liab. Ins. [1–6] at 1. Finally, the Court notes that that Certificate of Liability Insurance designates the Hudson **Policy** as an excess/umbrella **policy**. Therefore, even if the Court did consider the Certificate of Liability Insurance in this determination, the result would not be changed.

3 *See generally Allstate Ins. Co. v. Am. Hardware Mut. Ins. Co.,* 865 F.2d 592 (4th Cir.1989); *Towne Realty, Inc. v. Safeco Ins. Co. of Am.,* 854 F.2d 1264 (11th Cir.1988); *Allstate Ins. Co. v. Emp'rs Liab. Assur. Corp.,* 445 F.2d 1278 (5th Cir.1971); *Am. Family Mut. Ins. Co.,* 846 N.W.2d at 194; *Allstate Ins. Co. v. Exec. Car & Truck,* 494 So.2d 487 (Fla.1986); *U.S. Fire Ins. v. Md. Cas.,* 52 Md.App. 269, 447 A.2d 896 (1982); *Prudential Prop. Cas. Ins. Co. v. N.H. Ins. Co.,* 164 N.J.Super. 184, 395 A.2d 923 (1978); *NFU v. Farm & City Ins. Co.,* 689 N.W.2d 619 (S.D.2004).

4 The Court notes that although the "other insurance" clause in the Hudson **Policy** contains the terms "we will pay only our share," these terms do not convert it to a pro rata clause. Pro rata specifically means contribution by equal shares.

5 The Court reiterates that it can only determine the amount of **coverage** available on the insurance **policies** in the existing record and can only enter judgment against those **insurers** that are **parties** to this litigation. Furthermore, the reason the Court is able to apportion the loss with regard to the respective **policy** limits is that those **policy** limits are in the record in the case *sub judice.*