

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

FIRM NO. 42220

CONTINENTAL CASUALTY
COMPANY and COLUMBIA
CASUALTY COMPANY,

Plaintiffs,

v.

HENNESSY INDUSTRIES, INC., for
itself and as successor-in-interest to
Ammco Tools, Inc.; CERTAIN
UNDERWRITERS AT LLOYD'S,
LONDON, AND CERTAIN LONDON
MARKET INSURANCE COMPANIES;
EQUITAS INSURANCE LIMITED;
AMERICAN HOME ASSURANCE
COMPANY; ALLSTATE INSURANCE
COMPANY, as successor-in-interest to
Northbrook Excess and Surplus Insurance
Company, f/k/a Northbrook Insurance
Company; MUNICH REINSURANCE
AMERICA, INC., f/k/a American Re-
Insurance Company; EXECUTIVE RISK
INDEMNITY, INC., f/k/a American
Excess Insurance Company; FIRST
STATE INSURANCE COMPANY;
TWIN CITY FIRE INSURANCE
COMPANY; HARTFORD
UNDERWRITERS INSURANCE
COMPANY, f/k/a New York
Underwriters Insurance Company;
UNITED STATES FIRE INSURANCE
COMPANY; TIG INSURANCE
COMPANY, f/k/a International Insurance
Company and successor-in-interest to
International Surplus Lines Insurance
Company; TRANSPORT INSURANCE
COMPANY, f/k/a Transport Indemnity
Company; NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA; ZURICH
AMERICAN INSURANCE COMPANY,
as successor-in-interest to Zurich
Insurance Company, U.S. Branch; and
INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Defendants.

Case No. **12CH17080**

COMPLAINT

JURY TRIAL DEMANDED

FILED

MAY 07 2012

DOROTHY BROWN
CLERK OF CIRCUIT COURT

COMPLAINT

Plaintiffs CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY, by and through undersigned counsel, TROUTMAN SANDERS LLP, and as their Complaint against the Defendants HENNESSY INDUSTRIES, INC., for itself and as successor-in-interest to Ammco Tools, Inc. (“Hennessy”), CERTAIN UNDERWRITERS AT LLOYD’S, LONDON, AND CERTAIN LONDON MARKET INSURANCE COMPANIES, EQUITAS INSURANCE LIMITED, AMERICAN HOME ASSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, as successor-in-interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company, MUNICH REINSURANCE AMERICA, INC., f/k/a American Re-Insurance Company, EXECUTIVE RISK INDEMNITY, INC., f/k/a American Excess Insurance Company, FIRST STATE INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, f/k/a New York Underwriters Insurance Company, UNITED STATES FIRE INSURANCE COMPANY, TIG INSURANCE COMPANY, f/k/a International Insurance Company and successor-in-interest to International Surplus Lines Insurance Company, TRANSPORT INSURANCE COMPANY, f/k/a Transport Indemnity Company, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ZURICH AMERICAN INSURANCE COMPANY, as successor-in-interest to Zurich Insurance Company, U.S. Branch, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, allege on knowledge, information, and belief as follows:

NATURE OF THE ACTION

1. This is an action arising out of a dispute regarding whether, and/or to what extent, certain insurance policies provide coverage for underlying asbestos bodily injury claims.

PARTIES

2. Plaintiff Continental Casualty Company (“Continental”) is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois.

3. Plaintiff Columbia Casualty Company (“Columbia”) is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois.

4. Upon information and belief, Defendant Hennessy is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in La Vergne, Rutherford County, Tennessee. Upon information and belief, Hennessy is the successor by merger to Ammco Tools, Inc. (“Ammco”). Upon information and belief, Ammco was a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Illinois.

5. Upon information and belief, Defendants Certain Underwriters at Lloyd’s, London (“Lloyd’s”) and Certain London Market Insurance Companies (“London Market”) are corporations or other business entities existing under the laws of a jurisdiction within the United States or a foreign country jurisdiction or are individual underwriters at Lloyd’s.

6. Upon information and belief, Defendant Equitas Insurance Limited (“Equitas”) has assumed full and complete reinsurance obligations with respect to the non-life business prior

to 1993 of members and former members of Lloyd's.

7. Upon information and belief, Defendant American Home Assurance Company ("American Home") is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York, New York.

8. Upon information and belief, Defendant Allstate Insurance Company, successor-in-interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company ("Allstate"), is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Northbrook, Illinois.

9. Upon information and belief, Defendant Munich Reinsurance America, Inc., f/k/a American Re-Insurance Company ("Munich"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Princeton, New Jersey.

10. Upon information and belief, Defendant Executive Risk Indemnity, Inc., f/k/a American Excess Insurance Company ("Executive Risk"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Warren, New Jersey.

11. Upon information and belief, Defendant First State Insurance Company ("First State") is a corporation organized and existing under the laws of the State of Connecticut, with its principal place of business in Hartford, Connecticut.

12. Upon information and belief, Defendant Twin City Fire Insurance Company ("Twin City") is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business in Indianapolis, Indiana.

13. Upon information and belief, Defendant Hartford Underwriters Insurance

Company, f/k/a New York Underwriters Insurance Company (“Hartford”), is a corporation organized and existing under the laws of the State of Connecticut, with its principal place of business in Hartford, Connecticut.

14. Upon information and belief, Defendant United States Fire Insurance Company (“U.S. Fire”) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Morristown, New Jersey.

15. Upon information and belief, Defendant TIG Insurance Company, f/k/a International Insurance Company and successor-in-interest to International Surplus Lines Insurance Company (“TIG”), is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois.

16. Upon information and belief, Defendant Transport Insurance Company, f/k/a Transport Indemnity Company (“Transport”), is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Cambridge, Massachusetts.

17. Upon information and belief, Defendant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in New York, New York.

18. Upon information and belief, Defendant Zurich American Insurance Company (“Zurich”) is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Schaumburg, Illinois.

19. Upon information and belief, Defendant Insurance Company of the State of Pennsylvania (“ICSOP”) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in New York.

JURISDICTION AND VENUE

20. Jurisdiction is proper in this Court pursuant to 735 ILCS 5/2-701, as there exists a justiciable controversy capable of resolution by this Court and pursuant to 5/2-209(a)(1), (3), (4), (7), and (b)(3)-(4) because each of the Defendants resides and/or maintains an office in and/or is incorporated under the laws of the State of Illinois, and/or transacts business within the State of Illinois, and/or owns real estate situated in the State of Illinois, and/or contracted to insure a risk located within the State of Illinois, and/or made a contract substantially connected with the State of Illinois, and/or is a business entity conducting business within the State of Illinois.

21. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 and 102 because one or more of the defendants, including defendants Allstate, TIG, and Zurich, reside in Cook County, Illinois.

UNDERLYING CLAIMS

22. Hennessy, individually and as successor-in-interest to Ammco, has been named as a defendant in various underlying actions, alleging that Hennessy is subject to tort liability for injury allegedly sustained by the underlying claimants as a result of exposure to asbestos that was caused by the use of products manufactured, distributed or sold by Ammco (the "Underlying Actions" or "Underlying Claims"). Underlying Actions have been brought in Illinois courts and in other jurisdictions.

23. Upon information and belief, Hennessy has tendered the Underlying Actions to various insurance carriers under policies issued to Ammco from May 3, 1955 to August 1, 1987.

AMMCO'S PRIMARY INSURANCE COVERAGE

24. Upon information and belief, Lloyd's and London Market issued primary general liability policies to Ammco effective for the period May 3, 1955 to January 15, 1960 (the "London Primary Policies").

25. Upon information and belief, Zurich issued primary general liability policies to Ammco effective for the period December 31, 1962 to August 1, 1984 (the "Zurich Primary Policies").

26. Upon information and belief, National Union issued primary general liability policies to Ammco effective for the period August 1, 1984 to August 1, 1987 (the "National Union Primary Policies").

27. Upon information and belief, ICSOP issued a primary general liability policy to Ammco effective for the period August 1, 1986 to August 1, 1987 (the "ICSOP Policy").

28. The policies identified in paragraphs 24 to 27 are collectively referred to as the "Primary Policies," and the respective insurers are collectively referred to as the "Primary Insurers." Upon information and belief, a listing of policy numbers and policy periods for the Primary Policies is included in Exhibit A.

AMMCO'S EXCESS INSURANCE COVERAGE

29. Upon information and belief, Lloyd's and London Market issued excess general liability policies to Ammco effective for the period May 3, 1955 to January 15, 1960 (the "London Excess Policies").

30. Upon information and belief, National Union issued an excess general liability policy to Ammco effective for the period December 31, 1977 to December 31, 1978 (the

“National Union Excess Policy”).

31. Continental issued umbrella and excess third-party liability insurance policies to Ammco that provided coverage from July 5, 1967 to July 5, 1975 (the “Continental Policies”). The relevant provisions of the Continental Policies located to date are attached hereto as Group Exhibit B.

32. Upon information and belief, Allstate issued an excess general liability insurance policy to Ammco that provided coverage from July 5, 1975 to December 31, 1978 (the “Allstate Policies”).

33. Columbia issued one excess general liability insurance policy to Ammco that provided coverage from March 1, 1977 to December 31, 1977 (the “Columbia Policy”). The relevant provisions of the Columbia Policy located to date are attached hereto as Exhibit C.

34. Upon information and belief, First State issued excess general liability insurance policies to Ammco that provided coverage from December 31, 1978 to September 30, 1982 (the “First State Policies”).

35. Upon information and belief, Hartford issued excess general liability insurance policies to Ammco that provided coverage from September 30, 1982 to August 1, 1983 (the “Hartford Policy”).

36. Upon information and belief, TIG issued excess general liability insurance policies to Ammco that provided coverage from August 1, 1983 to August 1, 1986 (the “TIG Policies”).

37. Upon information and belief, Transport issued an excess general liability insurance policy to Ammco that provided coverage from August 1, 1984 to August 1, 1985 (the

“Transport Policy”).

38. Upon information and belief, American Home issued excess general liability insurance policies to Ammco that provided coverage from July 16, 1974 to December 31, 1977 (the “American Home Policies”).

39. Upon information and belief, Executive Risk issued excess general liability insurance policies to Ammco that provided coverage from December 31, 1979 to August 1, 1983 or September 30, 1983 (the “Executive Risk Policies”).

40. Upon information and belief, Munich issued an excess general liability insurance policy to Ammco that provided coverage from July 16, 1976 to December 31, 1977 (the “Munich Policy”).

41. Upon information and belief, U.S. Fire issued an excess general liability insurance policy to Ammco that provided coverage from December 31, 1978 to December 31, 1979 (the “U.S. Fire Policy”).

42. Upon information and belief, Twin City issued an excess general liability insurance policy to Ammco that provided coverage from September 30, 1982 to August 1, 1983 or September 30, 1983 (the “Twin City Policy”).

43. The policies identified in paragraphs 29 to 42 are collectively referred to as the “Excess Policies,” and the respective insurers are collectively referred to as the “Excess Insurers.” Upon information and belief, a listing of policy numbers and policy periods for the Excess Policies is included in Exhibit D.

**DEFENSE AND SETTLEMENT OF UNDERLYING
CLAIMS BY PRIMARY INSURERS**

44. Upon information and belief, Hennessy sought coverage from the Primary Insurers for certain Underlying Actions.

45. Upon information and belief, Zurich, National Union, Lloyd's and the London Market funded the defense and settlement of certain Underlying Actions.

46. Hennessy contends that, during 2008, the London Primary Policies were exhausted through payment of claims.

47. Upon information and belief, on or about April 18, 2008, Hennessy entered into a confidential cost-share agreement (the "CSA") with primary insurers National Union and Zurich regarding the Underlying Actions.

48. Upon information and belief, in the CSA, the parties agreed to apply Illinois law and purported to use the trigger and allocation methodologies outlined in the Illinois Supreme Court's decision in *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 514 N.E.2d 150 (1987) ("*Raymark*").

49. Upon information and belief, although the CSA purports to apply the "trigger of coverage" set forth in *Raymark*, in practice, the parties to the CSA did not allocate any amounts paid for Underlying Actions to the periods in which a claimant sustained "sickness or disease" within the meaning of *Raymark*.

50. Hennessy contends that, pursuant to the CSA, all Zurich Primary Policies issued prior to September 30, 1981, including primary policies which underlie the Continental Policies and the Columbia Policy, have been exhausted through the payment of claims.

51. Hennessy contends that, based upon the CSA, Zurich and National Union have no responsibility to make any payments for Underlying Claims with dates of last exposure prior to September 30, 1981.

52. Hennessy does not contend that the Zurich, National Union and ICSOP primary policies that provide coverage after September 30, 1981, have exhausted their limits of liability.

**HENNESSY'S DEMANDS TO THE EXCESS INSURERS &
THE TENNESSEE ACTION**

53. Hennessy has demanded that the Excess Insurers, including Continental and Columbia, pay for costs associated with Underlying Claims where the underlying plaintiff has alleged a date of last exposure to asbestos in connection with an Ammco product prior to September 30, 1981, in accordance with the methodology outlined by the CSA.

54. Plaintiffs dispute that they are obligated to pay any costs associated with Underlying Claims where the underlying plaintiff has alleged a date of last exposure to asbestos as a result of using an Ammco product prior to September 30, 1981, in accordance with the methodology outlined in the CSA.

55. Upon information and belief, the Excess Insurers (other than Plaintiffs) also dispute that they are obligated to pay costs associated with Underlying Claims where the underlying plaintiff has alleged a date of last exposure to asbestos as a result of using an Ammco product prior to September 30, 1981, in accordance with the methodology outlined in the CSA.

56. Despite its disputes with Hennessy, Continental has agreed to fund certain costs associated with one or more Underlying Claims under a complete reservation of rights. Total amounts paid by Continental to date exceed \$3,000,000.

57. On or about February 2, 2012, Hennessy filed an action against the Excess Insurers in the Chancery Court of Davidson County, Tennessee in a case styled *Hennessy Industries, Inc., for itself and as successor-in-interest to Ammco Tools, Inc. v. Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies, et al.* (the "Tennessee Action"). The complaint, attached hereto as Exhibit E, brings an action for breach of contract and seeks a declaration regarding the parties' rights and obligations under certain of the Excess Policies. The Tennessee Action does not seek a declaration of coverage with regard to the Primary Policies and does not name all of the Primary Insurers as parties.

RELEVANT PROVISIONS OF PLAINTIFFS' INSURANCE POLICIES

The Continental Policies

58. Each of the Continental Policies contains the following relevant language:

INSURING AGREEMENTS

1. Coverage

To indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability,

(a) imposed upon the Insured by law,

or

(b) assumed by the Insured under contract or agreement but only in respect of operations by or on behalf of the Named Insured,

for damages, direct or consequential, and expenses, all as defined by the term "ultimate net loss" on account of,

Personal Injuries, including death at any time resulting therefrom; or

Property Damage; or

Advertising Liability,

caused by or arising out of each occurrence.

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DEFINITIONS

2. Personal Injuries

The term "Personal Injuries" wherever used herein, shall mean:

Bodily Injury, Mental Injury, Mental Anguish, Shock, Sickness, Occupational Disease, Non-Occupational Disease, Disability, False Arrest, False Imprisonment, Wrongful Eviction, Wrongful Detention, Malicious Prosecution, Discrimination, Humiliation, Invasion of right of privacy, Libel, Slander or Defamation of Character;

except that which arises out of Advertising Liability.

6. Occurrence

The term "Occurrence" means an event or continuous or repeated exposure to conditions, which unexpectedly causes Personal Injury and/or Property Damage and/or Advertising Liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence.

7. Ultimate Net Loss

The term "Ultimate Net Loss" shall mean the total sum which the Insured or any company as his insurer becomes obligated to pay by reason of Personal Injury or Property Damage or Advertising Liability claims, either through adjudication or compromise, and all sums paid for expense, including premiums for attachment or appeal bonds, in respect to litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of employees and office expenses of the Insured or of any underlying insurer or any other expenses which are recoverable through any other valid and collectible insurance.

The Columbia Policy

59. The Insuring Agreement and the Definition of "Loss" in the Columbia Policy read as follows:

PART I – INSURING AGREEMENTS

1. Excess Liability Indemnity

To indemnify the insured for the amount of loss which is in excess of the applicable limits of liability of the underlying insurance inserted in column II of item 4 of the Declarations....

The provisions of the immediate underlying policy [Zurich Policy No. 8860839] are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same....

2. Policy Period: Termination of Underlying Insurance

This policy applies to injury or destruction taking place during this policy period, provided that when the immediate underlying policy insures occurrences taking place during its policy period, instead of injury or destruction taking place during its policy period, then this policy likewise applies to occurrences taking place during this policy period and “occurrences” is substituted for “injury or destruction” in Part III of this policy.

* * * *

PART II – DEFINITIONS

2. Loss

“Loss” means the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages, and other insurances (whether recoverable or not) other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy. *“Loss” does not include investigation, adjustment, defense or appeal costs and expenses nor costs and expenses incident to any of the same, notwithstanding that the underlying insurance may provide insurance for such costs and expenses.*

(emphasis added).

COUNT I

Declaratory Judgment – Plaintiffs Have No Obligation to Indemnify Hennessy for Underlying Actions Where All Available Primary Coverage Has Not Properly Exhausted

60. Plaintiffs re-allege and incorporate by reference Paragraphs 1-59 as if set forth fully herein.

61. As excess insurers, Plaintiffs have no obligation under Illinois law to provide Hennessy with coverage for an Underlying Action unless and until Hennessy establishes that all available primary coverage has exhausted for that claim. *Kajima Constr. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 113-14 (2007).

62. Moreover, as excess insurers, Plaintiffs have no obligation under Illinois law to provide Hennessy with coverage for an Underlying Action unless and until Hennessy establishes that all applicable underlying insurance has properly exhausted through payment of claims arising from injury that took place during the relevant policy period(s).

63. Hennessy has not demonstrated precisely when injury took place with respect to each Underlying Action or the amount of injury that occurred during any particular policy period. Consequently, Hennessy has not proven proper exhaustion of insurance underlying the Plaintiffs' policies.

64. Plaintiffs have no obligation to pay costs associated with an Underlying Action until Hennessy has proven that the underlying coverage has exhausted, nor do Plaintiffs have an obligation to indemnify Hennessy for costs associated with an Underlying Action where the applicable limits of underlying insurance are not properly exhausted.

COUNT II

Declaratory Judgment – Trigger and Allocation at the Excess Layer

65. Plaintiffs re-allege and incorporate by reference Paragraphs 1-64 as if set forth fully herein.

66. For any Underlying Action where Plaintiffs prove complete and proper exhaustion of applicable underlying insurance, Continental is obligated to indemnify Hennessy for ultimate net loss, and Columbia is obligated to indemnify Hennessy for loss, arising out of injury that took place during Plaintiffs' policy period(s). Plaintiffs are not obligated to indemnify Hennessy for any amounts attributable to injury taking place outside of Plaintiffs' policy period(s).

67. Plaintiffs are not parties to the CSA and, therefore, are not bound by its terms, including its terms regarding trigger and allocation. Additionally, Illinois courts have not adopted the trigger and allocation methodologies outlined in *Raymark* with respect to excess insurance policies such as those issued by Plaintiffs and the other Excess Insurers.

68. To the extent it is determined that Continental owes coverage for any Underlying Action, Continental is entitled to an allocation of the ultimate net loss in which Continental is only required to pay for ultimate net loss arising out of injury that occurred during its respective policy period(s).

69. To the extent it is determined that Columbia owes coverage for any Underlying Action, Columbia is entitled to an allocation of the loss in which Columbia is only required to pay for loss arising out of injury that occurred during its respective policy period.

COUNT III

Declaratory Judgment – No Duty To Defend

70. Plaintiffs re-allege and incorporate by reference Paragraphs 1-69 as if set forth fully herein.

71. Based on the Insuring Agreement and the definition of “loss,” which specifically excludes “investigation, adjustment, defense or appeal costs,” the Columbia Policy does not provide any coverage for defense costs.

72. Because the Columbia Policy does not provide coverage for defense costs, Columbia has no “duty to defend” Hennessy against the Underlying Actions or to reimburse Hennessy for the costs of the defense of the Underlying Actions.

73. Based on the Insuring Agreement and the definition of “ultimate net loss,” Continental has no “duty to defend” Hennessy with respect to any Underlying Action. Rather, to the extent Continental has an obligation to pay defense costs incurred with respect to an Underlying Action, Continental indemnifies Hennessy for defense costs for covered claims as part of “ultimate net loss.”

COUNT IV

Declaratory Judgment – Indemnity Obligations

74. Plaintiffs re-allege and incorporate by reference Paragraphs 1-73 as if set forth fully herein.

75. Hennessy must fund all amounts due for settlements and judgments. Plaintiffs have no obligation to “front” or pay directly to any underlying claimant any amounts incurred with respect to an Underlying Action unless Plaintiffs exercise the option to pay such amounts.

76. The determination of the amount, if any, for which Plaintiffs must indemnify Hennessy with respect to any Underlying Action must await resolution of the Underlying Action.

77. Plaintiffs have no obligation to pay any amounts incurred with respect to an Underlying Action where the action is dismissed without payment of indemnity amounts.

COUNT V

Declaratory Judgment – Number of Occurrences

78. Plaintiffs re-allege and incorporate by reference Paragraphs 1-77 as if set forth fully herein.

79. The Plaintiffs' policies provide coverage subject to the applicable limit of liability in each of the Plaintiffs' policies.

80. The Plaintiffs' policies include "per occurrence" limits of liability.

81. The Underlying Actions arise out of a single occurrence within the meaning of the Plaintiffs' policies.

82. For purposes of determining the applicable limits of liability, all Underlying Actions arise out of a single occurrence.

83. Any obligation that Plaintiffs have to indemnify Hennessy are subject to the per-occurrence limit set forth in each policy as applied per policy period, not annually.

COUNT VI

Reimbursement of Amounts Funded By Continental Pursuant to a Reservation of Rights

84. Continental re-alleges and incorporates by reference Paragraphs 1-83 as if set forth fully herein.

85. Subject to a complete reservation of rights, Continental paid over \$3,000,000 in

defense and indemnity for one or more of the Underlying Actions.

86. To the extent that Continental paid amounts for an Underlying Action where it is determined that all available primary coverage did not exhaust or that the applicable underlying limits of liability did not properly exhaust, Continental is entitled to recoup from Hennessy amounts it paid pursuant to a reservation of rights.

87. Alternatively, Continental is equitably subrogated to Hennessy's rights to obtain reimbursement from applicable Primary Insurer(s).

88. Alternatively, to the extent that Continental paid amounts for an Underlying Action where it is determined that all available primary coverage exhausted and that the applicable underlying limits of liability properly exhausted, Continental seeks equitable contribution from Hennessy and/or other applicable Excess Insurers for amounts Continental paid pursuant to a reservation of rights. Continental is entitled to contribution from Hennessy and/or other Excess Insurers for the amounts allocated to those parties attributable to injury taking place outside of Continental's policy periods.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment as follows:

(a) Declaring that Plaintiffs have no obligation to indemnify Hennessy for Underlying Actions where all available primary coverage has not properly exhausted;

(b) Declaring that, to the extent Plaintiffs are found to have any coverage obligation with respect to an Underlying Action, Plaintiffs are entitled to an allocation in which they are only required to pay for injury taking place during their policy periods and that Plaintiffs have no

obligation to pay for any amount attributed to injury taking place outside of their policy period(s);

(c) Declaring that Plaintiffs have no duty to defend Hennessy against any of the Underlying Actions and that Columbia has no obligation to pay or reimburse defense costs or expenses;

(d) Declaring that, to the extent Plaintiffs are found to have any coverage obligation with respect to an Underlying Action, Plaintiffs are not required to pay any costs prior to resolution and payment, by Hennessy, of such Underlying Action and that Plaintiffs have no obligation to pay for an Underlying Action dismissed without payment of settlement, judgment or other indemnity amounts;

(e) Declaring that all Underlying Actions constitute a single occurrence per policy period, not annually;

(f) Declaring that Continental may recoup from Hennessy or, alternatively, any other applicable Primary Insurer(s) amounts (plus interest) that Continental paid pursuant to a reservation of rights if it is determined that all available primary coverage or applicable underlying insurance did not properly exhaust. Alternatively, if Hennessy proves complete and proper exhaustion of applicable underlying coverage for Underlying Action(s) paid by Continental pursuant to a reservation of rights, Continental is entitled to equitable contribution from Hennessy and/or other applicable Excess Insurer(s) for any amounts paid by Continental for the Underlying Action(s), as well as interest from the time of that payment;


(g) All further relief that the Court deems to be just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated: May 8, 2012

Respectfully submitted,

By: 
*One of the Attorneys for Continental
Casualty Company and Columbia
Casualty Company*

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