UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HM HOLDINGS, INC., as successor in interest to SCM Corporation,	:	89 Civ. 2184 (Knapp)
Plaintiff,	:	
- against -	:	
CONTINENTAL CASUALTY COMPANY,	:	
Defendant.	:	

FIRST AMENDED COMPLAINT

HM Holdings, Inc. ("HMH"), as successor in interest to SCM Corporation (hereinafter collectively referred to as "SCM"), for its complaint against defendant, states as follows:

NATURE OF ACTION AND RELIEF SOUGHT

1. This is an action for declaratory judgment and for compensatory relief seeking:

a. A declaration of the obligations of the defendant insurance company under comprehensive general liability insurance policies sold to SCM with respect to SCM's actual and potential liabilities for bodily injury and property damage allegedly resulting from lead paint or lead paint pigment

manufactured and sold by The Glidden Company ("Glidden") with which SCM merged in 1962.

b. Damages against the defendant insurance company for breach of its contractual duties under its insurance policies with respect to the actual and potential liabilities described above.

IDENTITY OF PARTIES

2. HMH is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New Jersey. HMH is the successor in interest to SCM Corporation.

3. SCM Corporation was organized and existed under the laws of the State of Delaware, with its principal place of business in New Jersey, and was qualified to do business in New York. SCM Corporation was a successor in interest to a corporation of the same name that was organized and existed under the laws of the State of New York, with its principal place of business in New York.

4. The Glidden Company, formerly Glidden Coatings & Resins Division, was an operating division of SCM Corporation. Glidden was sold in 1986. (Unless otherwise stated, all references to SCM hereinafter include Glidden.)

5. Defendant Continental Casualty Company ("Continental") is an Illinois corporation with its principal place of business in Chicago, Illinois.

JURISDICTION

6. Subject matter jurisdiction is based upon 28 U.S.C. § 1332 (diversity) in that the parties are citizens of different states and the amount of controversy exceeds fifty thousand dollars ($50,000) exclusive of interest and costs. Jurisdiction is also invoked pursuant to the declaratory judgment provisions of 28 U.S.C. §§ 2201 and 2202.

VENUE

7. Venue is property in this district pursuant to 28 U.S.C. § 1391 in that the defendant is licensed to do business and is doing business in this district.

THE UNDERLYING LEAD PAINT LITIGATION

8. SCM is actively defending claims and anticipates defending further claims for various forms of relief on account of alleged bodily injury and property damage that have been made against SCM by various individuals in Louisiana, Massachusetts and Pennsylvania and by the City of New York, New York. To date, 102 actions alleging bodily injury resulting from exposure to lead paint or lead paint pigment have been filed against SCM. Four claims have been filed in Massachusetts, two in Pennsylvania and ninety-six in Louisiana. SCM reasonably expects similar claims to be brought in other states. In addition, the City of New York has brought an action against SCM alleging property damage resulting from the application in

buildings owned by the City of New York of lead paint or lead paint pigment manufactured by Glidden. The City of New York also seeks indemnification for amounts it has paid in settlement of bodily injury claims filed against the City by occupants of buildings allegedly containing lead paint, as well as for amounts for which it may become liable as a result of pending lead paint bodily injury claims.

THE POLICIES

9. From January 1, 1976 to January 1, 1985, Continental sold SCM three consecutive primary comprehensive general liability insurance policies (the "insurance policies"). Policy number CCP 2470548 covered SCM from January 1, 1976 to January 1, 1979; policy number CCP 004 72 51 76 covered SCM from January 1, 1979 to January 1, 1982; and policy number CCP 089-65-78-45 covered SCM from January 1, 1982 to January 1, 1985. All three Continental policies issued to SCM were executed in the State of New York. Upon information and belief, defendant Continental has copies of each such policy.

10. SCM paid all required premiums with respect to the insurance policies and each such policy was in full force and effect at all pertinent times.

11. All pertinent conditions to coverage have been satisfied or waived.

12. Each Continental policy contains a self-insured retention ("SIR") which represents the amount of money SCM must spend in defense and payment of all claims arising out of the

same occurrence before Continental becomes obligated to defend and indemnify SCM under its policies.

13. The lead paint claims against SCM arise from a single "occurrence" within the meaning of the insurance policies. SCM is thus obligated to pay only one SIR.

14. To date, SCM has incurred in excess of $2,000,000 in defense of the underlying lead paint or lead paint pigment claims.

15. SCM's payments have exhausted the applicable SIR. Continental, therefore, has a duty to defend SCM and to pay all future costs incurred in defending such pending and future claims. Continental has refused to reimburse SCM for payments in excess of the SIR.

16. SCM has informed and believes, and therefore alleges, that Continental maintains that each underlying claim against SCM arising from lead paint or lead paint pigment is a separate occurrence, subjecting SCM to a separate SIR for each such claim.

FIRST CLAIM

DECLARATORY RELIEF

Paragraphs 1 through 16 are incorporated and made part of this claim.

17. The insurance policies issued to SCM by Continental obligate Continental to pay on behalf of SCM all sums over and above the one applicable SIR which SCM becomes legally obligated to pay as damages due to bodily injury or

property damage occurring during the policy period of such policy, and to defend any claim for which SCM may be held liable after exhaustion of the one applicable SIR.

18. SCM has paid more than the applicable SIR in defending claims alleging lead-related bodily injury and property damage during the policy period of one or more of Continental's policies.

19. Continental is obligated to pay all sums SCM incurs in defense costs and/or becomes obligated to pay as damages because of bodily injury or property damage allegedly caused by lead paint or lead paint pigment occurring during one or more of Continental's policies, over and above the applicable SIR, on a per occurrence basis.

20. SCM has incurred and will incur great expenses in defense and resolution of these cases.

21. SCM is entitled to a declaration of the rights and obligations of the parties.

22. An actual, justiciable controversy exists between SCM and Continental regarding the proper interpretation of the insurance policies.

23. SCM has no adequate remedy at law.

SECOND CLAIM

BREACH OF CONTRACT

Paragraphs 1 through 23 are incorporated and made part of this claim.

24. Continental's refusal to respond in accordance with its contractual obligations to SCM's demand for reimbursement of defense costs incurred in defense of lead paint or lead paint pigment claims constitutes a breach of each of the insurance policies issued by Continental.

25. As a direct and proximate result of Continental's breach of its contracts of insurance, SCM has suffered damages in excess of $200,000 and continues to incur additional amounts on a daily basis.

WHEREFORE, SCM requests judgment as follows:

1. On its FIRST CLAIM a declaratory judgment that:

   a. Under the policies issued by it, Continental is obligated to pay in full on behalf of SCM all expenses incurred in defense of the underlying lead paint or lead paint pigment claims over and above the one applicable SIR; and

   b. Under each insurance policy issued by it, Continental shall be obligated to pay in full on behalf of SCM all sums which SCM has or shall become legally obligated to pay for bodily injury or property damage in the underlying lead paint or lead paint pigment cases, over and above the one applicable SIR contained in the insurance policies, unless the pleadings or proofs in such claims establish that the bodily injury or property damage occurred entirely outside the policy period of all of the insurance policies.

2. On its SECOND CLAIM for breach of contract, a money judgment for:

   a. Any sums paid by SCM in excess of the one applicable SIR for costs incurred in defending and/or resolving the underlying lead paint or lead paint pigment claims; and

   b. Prejudgment interest.

3. On both claims an award of:

a. Attorneys' fees and costs for bringing this action; and

b. Such other or further relief which this court deems appropriate.

Dated: New York, New York
October 5, 1989

POPHAM HAIK SCHNOBRICH &
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HM HOLDINGS INC., as successor in interest to SCM CORPORATION,	:	
Plaintiff,	:	89 CIV 2184 Knapp
v.	:	
CONTINENTAL CASUALTY COMPANY	:	
Defendant.	:	

ANSWER TO FIRST AMENDED COMPLAINT

Defendant Continental Casualty Company, by way of answer to the first amended complaint, states:

AS TO THE IDENTITY OF PARTIES

1. The defendant does not possess sufficient knowledge or information to admit or deny the allegations of paragraphs two, three and four.

2. Defendant admits the allegations of paragraph five.

AS TO JURISDICTION

3. The defendant denies the allegations of paragraph six.

AS TO VENUE

4. The defendant admits the allegations of paragraph seven to the extent that it is licensed to do business and is doing business in this district.

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AS TO THE UNDERLYING LEAD PAINT LITIGATION

5. The defendant admits that SCM is defending claims for various forms of relief and which have been made against SCM by various individuals in Louisiana, Massachusetts and Pennsylvania, and by the City of New York, New York. The defendant further admits that the City of New York has filed a Complaint against SCM, which Complaint speaks for itself. The defendant does not possess sufficient knowledge or information to admit or deny the remaining allegations of paragraph eight.

AS TO THE POLICIES

6. The defendant admits that it issued to SCM Comprehensive Liability Policy No. CCP 2470548 for the policy period from January 1, 1976 to January 1, 1979; Policy No. CCP 4725176 for the policy period from January 1, 1979 to January 1, 1982; and Policy No. CCP 89657845 for the policy period from January 1, 1982 to January 1, 1985. The defendant further admits that it has copies of each of these policies. The defendant denies the remaining material allegations of paragraph nine.

7. The defendant does not possess sufficient knowledge or information to admit or deny the allegations of paragraph 10.

8. The defendant denies the allegations of paragraph 11.

9. The defendant admits that each of the policies referred to hereinabove in paragraph six contains a self-insured retention ("SIR"). The defendant denies the remaining material allegations of paragraph 12.

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10. The defendant denies the allegations of paragraph 13.

11. The defendant does not possess sufficient knowledge or information to admit or deny the allegations of paragraph 14.

12. The defendant denies the allegations of paragraph 15.

13. The defendant does not possess sufficient knowledge or information to determine whether each underlying claim as alleged in paragraph 16 of the first amended complaint involves an occurrence under any of the policies referred to hereinabove in paragraph six, and therefore denies the allegations of paragraph 16.

AS TO THE FIRST CLAIM: DECLARATORY RELIEF

14. The defendant denies the allegations of paragraph 17.

15. The defendant does not possess sufficient knowledge or information to admit or deny the allegations of paragraph 18.

16. The defendant denies the allegations of paragraph 19.

17. The defendant does not possess sufficient knowledge or information to admit or deny the allegations of paragraph 20.

18. The defendant denies the allegations of paragraphs 21 and 22.

19. The defendant admits that SCM is entitled to know remedy at law or otherwise and denies the remaining allegations of paragraph 23.

AS TO THE SECOND CLAIM: BREACH OF CONTRACT

20. The defendant denies the allegations of paragraphs 24 and 25.

FIRST DEFENSE

The first amended complaint fails to state a claim against the defendant upon which relief can be granted.

SECOND DEFENSE

There is no amount in controversy exceeding $50,000 exclusive of interest and costs; consequently, this court lacks subject matter jurisdiction.

THIRD DEFENSE

The allegations of the first amended complaint do not present a substantial, immediate and real controversy so as to warrant a declaratory judgment under 28 U.S.C. sections 2201 and 2202.

FOURTH DEFENSE

The allegations of the first amended complaint are not ripe for adjudication so as to warrant the declaratory relief sought in the first amended complaint.

FIFTH DEFENSE

At the time(s) and place(s) mentioned in the first amended complaint, the defendant violated no legal duty owing by it to the plaintiff.

SIXTH DEFENSE

The defendant denies breaching any of the terms or conditions of any insurance policy referred to in the first amended complaint.

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SEVENTH DEFENSE

No justiciable case or controversy presently exists between the plaintiff and defendant.

EIGHTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the grounds that any or all of the underlying claims against the plaintiff do not constitute an occurrence to which any insurance policy alleged in the first amended complaint applies.

NINTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the grounds that any or all of the underlying claims against the plaintiff do not constitute property damage as defined in any of the policies alleged in the first amended complaint.

TENTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the grounds that any or all of the underlying claims are not covered under the policies alleged in the first amended complaint and therefore, the plaintiff is not entitled to recovery in this action, nor does the defendant have any duty to defend or indemnify the plaintiff.

ELEVENTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the grounds that the plaintiff has failed to perform all of its obligations under any or all of the policies alleged in the first amended complaint.

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TWELFTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the grounds that any or all bodily injury or property damage in the underlying claims or lawsuits do not arise from events which unexpectedly cause injury during the policy period or a continuous or repeated exposure to conditions which unexpectedly causes bodily injury or injury to or destruction of property during the policy period.

THIRTEENTH DEFENSE

The claims asserted in the first amended complaint are barred in whole or in part by the terms, exclusions, conditions and limitations contained in the applicable insurance contracts.

FOURTEENTH DEFENSE

To the extent that plaintiff negligently or intentionally failed to disclose, concealed or misrepresented facts which were material to the risks undertaken by the defendant, the claims asserted in the first amended complaint are barred.

FIFTEENTH DEFENSE

To the extent that the plaintiff has failed to mitigate, minimize or avoid any damages allegedly sustained by it, any recovery against the defendant must be reduced by that amount.

SIXTEENTH DEFENSE

Defendant reserves the right to move to dismiss the first amended complaint on the grounds that the policies issued by them to plaintiff exclude losses arising out of intentional

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conduct on the part of the insured. Inasmuch as the plaintiff's losses as alleged in the first amended complaint arise in whole or in part out of the intentional conduct, these claims are barred.

SEVENTEENTH DEFENSE

The policies issued to plaintiff by the defendant do not provide coverage for punitive damages. To the extent that the first amended complaint seeks indemnification or a defense in connection with claims for punitive damages against plaintiff, the claims asserted in the first amended complaint are barred in whole or in part.

EIGHTEENTH DEFENSE

Any duties of the defendant, under policies of insurance issued to plaintiff, to defend, to reimburse or to indemnify plaintiff with respect to any claims or actions are subject to such deductibles, limits of liability and annual aggregate limits contained in the policies at issue in this action.

NINETEENTH DEFENSE

The first amended complaint is barred by the doctrine of unclean hands.

TWENTIETH DEFENSE

The first amended complaint is barred by the doctrine of equitable estoppel.

TWENTY-FIRST DEFENSE

The policies alleged in the first amended complaint provide insurance in excess of the insured's retention as provided in each policy.

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TWENTY-SECOND DEFENSE

The plaintiff has no right to an action against the defendant under the terms and conditions of any policy alleged in the first amended complaint because the plaintiff has not fully complied with the terms of said policies.

TWENTY-THIRD DEFENSE

The plaintiff's first amended complaint is barred under the terms and conditions of any policy alleged therein because the amount of the insured's obligation has not been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the defendant.

TWENTY-FOURTH DEFENSE

The plaintiff has failed to join necessary and indispensible parties including but not limited to other insurance carriers which issued to the plaintiff policies of insurance which may apply to any and all underlying claims.

TWENTY-FIFTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint or for a stay of this action on the grounds that there are similar actions pending in state courts in which the matters alleged in the first amended complaint can be resolved, including but not limited to a declaratory judgment action brought by the plaintiff against the defendant and other parties in the Superior Court of New Jersey, Law Division, Union County, which action is entitled SCM Corporation v. Lumbermen's Mutual Casualty Company, et al. and bears the docket no. L-96187-87.

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TWENTY-SIXTH DEFENSE

The defendant reserves the right to dismiss the first amended complaint as barred by doctrines of res judicata and collateral estoppel.

TWENTY-SEVENTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the ground of forum non conveniens or for transfer of this action under 28 U.S.C. section 1404(a).

TWENTY-EIGHTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the ground that the policies alleged in the first amended complaint do not apply to property damage to property owned by the plaintiff.

TWENTY-NINTH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the ground that the policies alleged in the first amended complaint do no apply to property damage to the plaintiff's products arising out of such products or any part of such products.

THIRTIETH DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the ground that the policies alleged in the first amended complaint do not apply to damages claimed for the withdrawal, inspection, repair, replacement or loss of use of the plaintiff's products or work completed by or for the plaintiff, or of any property of which such products or

work form a part, if such products or work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

THIRTY-FIRST DEFENSE

The defendant reserves the right to move for dismissal of the first amended complaint on the ground that the plaintiff failed to provide defendant with timely written notice of any and all occurrences, offenses, injuries, claims or suits alleged in the first amended complaint.

Dated: New York, New York
October 13, 1989

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Attachment

DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HM HOLDINGS, INC., as successor in interest to SCM CORPORATION,	:	
Plaintiff,	:	89 Civ. 2184 (Knapp)
vs.	:	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
CONTINENTAL CASUALTY COMPANY,	:	PARTIAL SUMMARY JUDGMENT
Defendant.	:	

INTRODUCTION

This declaratory judgment action arises out of defendant Continental Casualty Company's ("CNA") wrongful refusal to honor its contractual obligations to defend its insured SCM Corporation (and HM Holdings, Inc. as successor in interest to SCM) against claims brought against SCM the Glidden Company ("Glidden"), a division of SCM until October 31, 1986.1/ The claims allege bodily injury or property damage resulting from the exposure to or application of lead paint or lead paint pigment manufactured by Glidden. The bodily injury and property damage are alleged to have occurred during the policy periods of

1/ (SCM, HM Holdings and Glidden are collectively referred to as "SCM").

three standard language comprehensive liability policies issued by CNA to SCM.

STATEMENT OF FACTS

The facts are set forth in detail in HM Holdings' Statement Pursuant to Local 3(g) of Material Facts Not In Dispute and in the Affidavits of Samuel Friedman and Ginger Herbst sworn to on January __, 1990 and December 22, 1989, respectively.

I. THE UNDERLYING LEAD PAINT LITIGATION

SCM has been sued in ninety-eight actions alleging bodily injury resulting from exposure to lead paint or lead paint pigment manufactured decades ago by Glidden. Four of these claims were filed in Massachusetts, ninety-two claims were filed in Louisiana and two claims were filed in Pennsylvania.

In addition, the City of New York filed a complaint against SCM alleging property damage arising from the application of Glidden lead paint or lead paint pigment in City-owned buildings. The City also seeks indemnification for amounts the City has paid and may be required to pay to settle lead paint bodily injury claims arising from exposure to Glidden lead paint or lead paint pigment in City-owned buildings.

It cannot be determined from the face of these underlying claims the exact year or years in which each alleged injury occurred. Such determinations are not likely to be made

until discovery has progressed much further in these cases. However, CNA has admitted that the allegations contained in the majority of the underlying claims would permit proof that the allegedly injured parties therein suffered bodily injury during one or more of the years CNA insured SCM. CNA has admitted further that the property damage claim filed by the City of New York would permit proof in court that City-owned buildings allegedly containing Glidden lead paint or lead paint pigment suffered a diminution in value during the period 1976 to 1984, the CNA policy years. Accordingly, CNA all but concedes that the underlying claims could trigger CNA's coverage obligations under the policies it issued to SCM.

II. CNA'S REFUSAL TO DEFEND

Despite its recognition of possible coverage for the underlying claims, CNA has refused to pay even one cent of SCM's defense costs, which now total over $2 million.

SCM initially notified CNA, as well as SCM's other carriers, of the underlying claims in December 1987, shortly after the first of the claims were served upon SCM, and requested CNA to honor its policy obligations to SCM. Acknowledging its defense obligations, CNA agreed on January 18, 1988 to pay for the defense of the underlying claims on a monthly basis. CNA also agreed to take responsibility as the lead carrier for reporting to SCM's other carriers on the status of the underlying litigation and for seeking contribution

towards defense costs from those other carriers. Based on discussions with CNA, SCM understood that it would be responsible for the first $250,000 of the defense costs for all underlying claims combined, pursuant to the self-insured retention provisions in CNA's policies, and that thereafter CNA would begin paying defense costs. Therefore, in October 1988, when SCM had incurred over $250,000 in legal fees, SCM directed its counsel to send all legal bills directly to CNA.

In December 1988, CNA again confirmed that it would take responsibility for seeking contribution for defense costs from SCM's other carriers and for ensuring that SCM's legal bills were paid. In fact, CNA represented that it would endeavor to secure payment of SCM's legal bills in January 1989.

In March 1989, CNA did an about-face on the defense cost issue. By letter dated March 14, 1989, CNA acknowledged that SCM had incurred at least $414,929.34 in defense costs for the underlying claims. However, CNA broke down the total figure and apportioned legal fees separately among each of the individual underlying claims. Based on its calculations, CNA then determined that SCM had not incurred legal fees in excess of $250,000 for any individual claim and therefore refused payment. This position was a complete reversal of CNA's previous agreement to begin paying defense costs when SCM had incurred $250,000 in the aggregate in defending all of the underlying claims combined. Moreover, this position reflects

CNA's unsupportable contention that each of the individual underlying claims constitutes a separate "occurrence," as defined in the Policies, to which a separate SIR applies.

III. CNA'S COVERAGE OBLIGATIONS UNDER ITS COMPREHENSIVE LIABILITY INSURANCE POLICIES.

CNA sold SCM three consecutive primary comprehensive liability insurance policies under which SCM was insured from January 1, 1976 to January 1, 1985 (the "Policies").

The insuring agreements in the Policies, which define CNA's indemnification and defense obligations, provide:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:
>
> (a) bodily injury or property damage caused by an occurrence,
>
> ... to which this policy applies, and the company shall have the right and... the duty to defend any suit against the insured seeking damages on account of such injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent....

Each of the Policies contains a self-insured retention ("SIR"), or deductible amount, which represents the sum SCM must spend in defense and/or payment of claims arising from the same "occurrence" before CNA's obligation to defend or indemnify SCM ripens. "Occurrence" is defined in the Policies as:

> an event which unexpectedly causes injury during the policy period or a continuous or repeated exposure to conditions which unexpectedly causes

bodily injury, personal injury or injury to or destruction of tangible property during the policy period.

Under SCM's 1976-1978 policy, the SIR for the year 1976 is $25,000 per occurrence for all bodily injury and property damage claims combined. For the years 1977 and 1978, the SIR is $100,000 per occurrence for bodily injury and property damage claims combined. Under SCM's 1979-1981 and 1982-1985 policies, the SIRs are $250,000 per occurrence for bodily injury and property damage claims combined.

In addition to the Policies, SCM entered into various Claim Service Agreements and Claim Handling Agreements with CNA for the years 1977 through 1984. These Claim Service or Claim Handling Agreements supplement the Policies with respect to, inter alia, payment of "allocated claim expenses" when a claim is asserted against SCM. "Allocated claim expenses" is defined in each of the Agreements to include "fees for attorneys." The pertinent provisions in these Agreements are as follows:

> 1977 Claim Service Agreement:
>
> SCM shall be responsible for all claim loss payments and allocated claim expenses which do not exceed the deductible [SIR] amounts.... (See Danforth Ex. D at ¶ 5.)

1978 Claim Service Agreement:

SCM shall be responsible for the investigation, negotiation and settlement of claims within the retention limits and in the incurring of allocated claim expenses.... (See Danforth Ex. E at ¶ 5.)

1979, 1980 and 1981 Claim Service Agreements:

Where a claim or lawsuit, in SCM's opinion, has a demand or a potential of $250,000 and above to $5,000,000, SCM must give notice to CNA. CNA controls handling and defense. SCM pays first $250,000 and pro rata on allocated claim expense. CNA pays remainder. (See Danforth Ex. F-H at ¶ 5.)

1982, 1983 and 1985 Claim Handling Agreements:

SCM will be responsible for the combination of all claim loss payments and allocated claim expenses which do not exceed the retention [SIR] limits in the agreement.

Where a claim or lawsuit in SCM's opinion has a potential based on injury or damage (including allocated claim expenses) notwithstanding any question of liability over $250,000, SCM must give notice to CNA, and CNA controls handling and has right to select counsel.... SCM pays the first $250,000 of combined claim and allocated claims expenses. (See Danforth Ex. I-K at ¶¶ 3, 5(c).)

ARGUMENT

I. CNA HAS A DUTY TO DEFEND SCM IN THE UNDERLYING LEAD PAINT CLAIMS.

Under the Policies, CNA agreed to defend SCM in any suit against SCM seeking damages on account of bodily injury or property damage occurring during the policy "even if any of the allegations of the suit are groundless, false or fraudulent." (See Danforth Ex. A, B, and C at ¶ 1.) In construing this standard provision, courts have repeatedly and unequivocally

held that a carrier's duty to defend is much broader than its duty to indemnify. National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404, 1407 (S.D.N.Y. 1986). Indeed, the court in National Grange noted, "[t]he obligation to defend has been deemed 'litigation insurance' as well as 'liability insurance.'" Id. An insurance carrier's duty to defend its policyholder attaches when a claim made against the policyholder raises the possibility that the policyholder could be held liable for an act covered by the policy. A. Myers & Sons Corp. v. Zurich American Ins. Group, No. 197, slip op. (N.Y. Oct. 17, 1989). Even if only a portion of the allegations of the underlying claim state covered claims against the policyholder, the carrier nonetheless must defend the entire case. Thus, the carrier must pay for the defense of the entire case unless and until it can show that there is no possibility that it will be required to cover any liability arising out of any claim in the complaint. National Grange, 650 F. Supp. at 1408.

As the New York Court of Appeals stated in International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322, 325, 361 N.Y.S.2d 873, 320 N.E.2d 619, 621 (1974),

> if [an] insurer is to be relieved of a duty to defend it is obligated to demonstrate that the allegations of the complaint [in the underlying action] cast that pleading solely and entirely within the policy exclusions, and, further, that

> the allegations, in toto, are subject to no other interpretation.

Similarly, in Villa Charlotte Bronte, Inc. v. Commercial Union Ins. Co., 64 N.Y.2d 846, the Court of Appeals ruled:

> The insurer [can] . . . only be excused from defending [the insured] because of the language of the policy exclusion if it [can] establish, as a matter of law, that there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify . . . under any provision contained in the policy. . .

Accord Lumbermens Mut. Cas. Co. v. United Services Auto. Assn., 218 N.J. Super. 492, 528 A.2d 64 (1987) (duty to defend is independent of or broader than duty to indemnify); Hartford Ins. Group v. Mason Construction Corp., 186 N.J. Super. 253, 452 A.2d 473 (1982) (insured's obligations to defend is triggered by a complaint against the insured alleging a cause of action which may potentially come within the coverage of the policy, irrespective of whether it ultimately does come within the policy's coverage and hence irrespective of whether the insurer is ultimately obliged to pay); City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St. 3d 177, 459 N.E. 2d 555 (1984) (where allegations state a claim arguably within a policy's coverage, the insurer must accept defense of the claim).

CNA does not dispute its obligation to defend SCM in the underlying cases. Indeed, CNA acknowledged that obligation shortly after the first of the underlying claims was filed against SCM by agreeing to pay SCM's defense costs with respect

to the underlying claims. What CNA disputes is when that obligation, when coupled with the SIRs in its Policies, requires CNA to begin paying SCM's defense costs. Resolution of this dispute turns on the answer to two questions: (1) How many CNA policies are potentially "triggered" by the underlying claims because the allegations would permit proof that injury occurred during the policy period? (2) Is it legally and factually possible that all of the underlying claims arise from a single occurrence? If it is legally and factually possible that each of the Policies is triggered by the underlying claims and that the underlying claims result from a single occurrence, CNA must pay all of SCM's defense costs in excess of one SIR.

II. CNA IS OBLIGATED TO DEFEND ANY CLAIM ALLEGING OR PERMITTING PROOF OF INJURY DURING THE POLICY PERIOD OF THE CNA POLICIES.

The defense obligations in CNA's Policies obligate CNA to defend any claim that alleges or permits proof of injury during the policy period of one or more of its Policies. National Grange, supra; International Paper, supra. CNA admits that the typical allegations of an underlying lead paint complaint filed against SCM permit proof that bodily injury occurred anywhere during the period from the birth of an allegedly injured child to the time the child was diagnosed as suffering from lead poisoning as a result of exposure to lead paint or lead paint pigment. (See Danforth Exhibit L at ¶¶ 16, 18, 20, 22.) Moreover, CNA admits that this period of potential injury for

one or more claims falls within the policy period of each of CNA's Policies. Id.

In fact, each of the Policies may be triggered by numerous underlying complaints. For example, in at least forty-two cases, the period between the allegedly injured child's date of birth and the date the child was diagnosed as suffering from lead poisoning overlaps the 1982-1985 period. (Friedman Aff. at ¶ __.) These claims thus permit proof that injury occurred during the policy period of the 1982-1985 Policy. Likewise, in at least thirty-seven other claims, the period between the allegedly injured child's date of birth and the date of a lead poisoning diagnosis involves at least one of the years from 1979 through 1981, inclusive, and in at least thirty claims the same period involves at least one of the years from 1976 through 1978, inclusive. (Friedman Aff. at ¶¶ __.) These claims thus permit proof that injury occurred during the policy periods of the 1976-1979 and 1979-1982 Policies respectively. Because each of the Policies is potentially triggered by one or more of the underlying bodily injury claims, CNA's obligation to defend SCM is triggered under each of the Policies.

Even if CNA had not conceded that its defense obligations are triggered under each of its Policies, the case law makes clear that is the case. As Judge Weinstein explained in Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D.N.Y. 1988), an insurance policy is "triggered" when the time of the

injury falls within the effective dates of the policy. 707 F. Supp. at 1387. In cases involving injury resulting over time from "continuous or repeated exposure to conditions," such as lead exposure, bodily injury may have occurred at any time throughout the period from an individual's initial exposure to the harmful substance and the time the injury becomes manifest or diagnosable. See American Home Products Corp. v. Liberty Mutual Ins. Co., 748 F.2d 760, 764 (2d Cir. 1984); Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir.), cert. denied, 455 U.S. 1007 (1981), reh'g denied, 456 U.S. 951 (1982); In Re Asbestos Insurance Coverage Cases, Jud. Council Coord. Proceeding No. 1072, Phase III, Tentative Dec. at _____, (Cal. Super. May 29, 1987), reported in Mealey's Litigation Reports - Insurance 4440, 4468 (1987).

In Uniroyal, for example, the court found that injury in fact occurred within approximately two weeks from the time "Agent Orange" herbicides were sprayed, or four months from the date the herbicides were shipped to Vietnam. 707 F. Supp. at 1389. Courts have reached similar conclusions concering the trigger of coverage in property damage cases. See Carey Canada, Inc. v. Aetna Cas. & Sur. Co., No. 84-3113 (D.D.C. March 31, 1988) (attached hereto as Exhibit __); Dayton Independent School District v. National Gypsum Co., 682 F. Supp. 1403 (E.D. Tex. 1988), appeal pending, Nos. 88-2902, 88-6164 (5th Cir.).

Similarly, allegations concerning property damage in the New York City complaint may trigger each of the Policies. CNA has admitted that the allegations in the New York City complaint would permit proof that the City-owned buildings which allegedly contain Glidden lead paint or lead paint pigment suffered a diminution in value during each of the CNA policy years. (See Danforth Exhibit L at ¶ 25.) Diminution in value constitutes "property damage" within the meaning of the Policies.[2/] See, e.g., Dayton Independent School District v. National Gypsum Co., supra; Hauenstein v. St. Paul Mercury Indem. Co., 65 N.W.2d 122 (Minn. 1954); Pittsburgh Corning Corp. v. Travelers Indem. Co., No. 84-3985 (E.D. Pa. Jan. 20, 1988), reported in Mealey's Litigation Reports - Insurance A (Feb. 9, 1988) (attached hereto as Exhibit __). Accordingly, the City of New York complaint permits proof that "property damage" occurred during each of the CNA policy years as a result of the application of Glidden lead paint or lead paint pigment in City-owned buildings.

III. IT IS POSSIBLE, AND EVEN PROBABLE, THAT THE UNDERLYING LEAD PAINT CLAIMS AROSE FROM A SINGLE OCCURRENCE.

CNA's obligations to defend the underlying claims is limited only by virtue of the self-insured retentions in the Policies. Under these SIRs, SCM must pay a specified amount for

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2/ While SCM denies that Glidden lead paint or lead paint pigment has caused any property damage, if it is held liable notwithstanding its contention, CNA would be obligated to indemnify SCM.

defense and/or liability before CNA's obligation to pay defense costs ripens. For example, in CNA's 1979-1981 and 1982-1985 Policies, SCM must absorb $250,000 for defense costs and liability combined for claims resulting from the same occurrence before CNA is obligated to pay defense costs and indemnify SCM. (See Danforth Exhibits B, C at Endorsement No. 14.)

The SIRs in the Policies apply on a "per occurrence" basis. In other words, SCM must absorb only one SIR for all claims potentially triggered in a CNA policy that arise out of the same occurrence, before CNA's defense obligations are triggered. An occurrence is defined as:

> as event which unexpectedly causes injury during the policy period or a continuous or repeated exposure to conditions which unexpectedly causes bodily injury, personal injury or injury to or destruction of tangible property during the policy period.

(See Danforth Ex. A, B and C at p. 5.)

CNA's sole basis for not paying SCM's defense costs rests on its contention that each lead paint claim arises out of a separate single occurrence thus permitting it to avoid any defense obligation whatsoever. In effect CNA would treat each injury as a separate occurrence.

Because CNA's contention concerns its defense obligations, CNA must show that there is no conceivable set of facts provable in the underlying litigation that would establish that all of the lead paint claims arise out of a single occurrence under any

permissible construction of its Policies. If the facts potentially provable in the underlying claims could establish that the claims result from a single occurrence under any fair reading of that term, CNA must now defend SCM.

Here, both the facts and the case law demonstrate that CNA's contention is utterly without merit. The cases establish two points: First the cause of injury, not the injury itself, constitutes the occurrence. Second, where a policyholder makes numerous deliveries of a product as part of a "routinized, repetitious process," the deliveries collectively constitute a single occurrence. CNA's own admissions establish a final point: CNA knows of no facts that would distinguish Glidden's distribution of lead paint and lead paint pigment from the routinized, repetitious delivery of a product courts have repeatedly held to constitute a single occurrence.

A. The Cause Of Injury, Not The Injury Itself, Constitutes The Occurrence.

In a number of cases factually similar to this action, courts have rejected the contention CNA advances and have held that the delivery of products which later cause injury constitutes an "occurrence," not the resulting injuries. In Uniroyal, Inc. v. Home Ins. Co., supra, for example, the policyholder manufactured and delivered to the U.S. military a variety of phenoxy herbicides labelled Agents Orange, White,

Blue, Pink, Purple and other designations,[3/] for use in Vietnam. 707 F. Supp. at 1370. The herbicides were disseminated through over twenty thousand aerial spray sorties, as well as many smaller hand-held spray applications. Id. During the relevant time period, Uniroyal made a total of 110 deliveries to the U.S. Air Force. Id. Each delivery consisted of 100 or more 55-gallon drums of the various herbicides. Id. A class action later was filed against Uniroyal, the United States and other manufacturers by approximately 2.5 million Vietnam veterans. Id. at 1369. The veterans alleged that they had suffered a variety of serious bodily injuries as a result of exposure to the herbicides. Id. Uniroyal settled the class action and then sought to recover its defense costs and its share of the settlement from its insurance carrier under policy provisions virtually identical to the pertinent provisions in CNA's policies. Id. at 1371-1372.

The carrier took the position that each spraying of herbicides in Vietnam, of which there were more than 20,000, was a separate occurrence subject to a separate deductible. Id. at 1380. Judge Weinstein, however, rejected the carrier's attempt to define "occurrence" with reference to the time and place of the ultimate injury, stating:

> The occurrence is not defined to be the injury;

3/ The herbicides were referred to collectively as "Agent Orange" in the Uniroyal litigation.

> the injury is clearly stated to be the result of the occurrence. The plain meaning of the policy language is unambiguous and admits of no other interpretation. If the policy had defined the occurrence to be both the "event and the injury resulting therefrom," Home's position might find some basis, but on the present language it does not.

Id. Similiarly in Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., 577 F. Supp. 1515, 1525 (D.D.C. 1984), the court held that all asbestos-related bodily injury claims against Owens-Illinois arose out of a single occurrence for purposes of applying "per occurrence" deductibles in Owens-Illinois' policies. As the court explained, "[T]he calculation of the number of occurrences must focus on the underlying circumstances which resulted in the personal injury and claims for damage rather than each individual claimant's injury."). Accord Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 687 F.2d 561 (3d Cir. 1982) ("The general rule is that an occurrence is determined by the cause or causes of the resulting injury."); Cargill, Inc. v. Liberty Mut. Ins. Co., 488 F. Supp. 49, 53 (D. Minn. 1979) ("[I]t is more reasonable to evaluate an occurrence as the cause of property damage rather than as the property damage itself."); Champion International Corp. v. Continental Cas. Co., 546 F.2d 502, 505 (2d Cir. 1976) ("We can immediately reject Continental's argument that there were 1,400 separate occurrences. There could have been 1,400 claims . . . those are not before us." (emphasis by the court.))

Treating each individual claim as a separate occurrence would thwart the objectively reasonable expectations of the parties at the time of contract by effectively depriving SCM of any coverage whatsoever. In rejecting the argument proffered by the carriers in Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co., No. C-3939-84, slip op. (N.J. Super. April 12, 1989), that each claim is a separate occurrence, the court observed that such an approach is contrary to "elementary justice." The court noted:

> The purchaser is supposed to get something for his premium money. He cannot be left with an illusory phantom. The fact is that Diamond spent substantial sums of money purchasing many hundreds of insurance policies which supposedly afforded it scores of millions of dollars of product liability coverage. Any interpretation of the concept of occurrence which would result in zero recovery on a $23,000,000 product liability loss simply is not acceptable, because it cheats the purchaser out of his reasonable expectation of coverage. Any interpretation of occurrence which would result in nominal or very minimal recovery is suspect on the same grounds.

Diamond Shamrock, slip op. at 40.

Similarly, the court in Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., supra, rejected an insurance carrier's argument that each of numerous bodily injury claims arising from the exposure to asbestos-containing products manufactured by the policyholder was a separate occurrence because such an interpretation of the policy language was contrary to the objectively reasonable expectations of the parties. On the one hand, the court noted,

if each claim constituted a single occurrence, "then Aetna's limit of liability would be rendered meaningless as it strains the imagination to conceive of a single claim that would generate $20 million of damage." Id. at 1527. Conversely, the court continued, "it is reasonably foreseeable that a manufacturer . . . would be involved in a causative event producing multiple injuries and resulting in total damages of $20 million or more." Id.

This analysis applies with equal force to SCM. For six of the nine years SCM was insured by CNA, CNA's limit of liability was $5 million per occurrence. It is unreasonable to assume that SCM would have found it necessary to procure this amount of insurance for every claim that may be asserted against it. Indeed, such an interpretation of the Policies would render the limit of liability meaningless as few claims would generate $5 million of damage. To the contrary, given this amount, SCM could reasonably expect that the $5 million limit of liability would apply to multiple injuries rather than a single injury.

B. Where Numerous Deliveries Of A Product Are Made As Part Of A "Routinized, Repetitive Process," The Deliveries Collectively Constitute A Single Occurrence.

As provided in the Policies, an "occurrence" may be either a discrete event or a "continuous or repeated exposure to conditions" which unexpectedly causes injury during the policy period. (See Danforth Ex. A, B and C at p. 5.) In cases

involving mass deliveries of hazardous products resulting in injury to numerous individuals or properties, the deliveries have been held to collectively constitute a single occurrence under this definition. For example, in Uniroyal, the court found that the policyholder's delivery of Agent Orange to the military was the "occurrence." As Judge Weinstein explained:

> The delivery was the last act performed by Uniroyal in which it exercised any control over the herbicides. The delivery is also the conceptual point at which Uniroyal set its contaminated herbicides free upon the world to do their damage.

Uniroyal, 707 F. Supp. at 1380. The court concluded that the deliveries of Agent Orange collectively constituted a single, continuous occurrence because they were part of a "routinized, repetitive process through which a large supply of herbicides was funneled to the military." Id. at 1383. See also Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co., supra (adopting Uniroyal holding that "entire series of deliveries constituted a single occurrence"); Air Products and Chemicals, Inc. v. Hartford Acc. and Indem. Co., No. 86-7501 (E.D. Pa. Feb. 21, 1989), reported in Mealey's Litigation Reports - Insurance A (Feb. 28, 1989) (attached hereto as Exhibit __) (sale of a variety of asbestos products resulting in numerous injuries held to constitute only one occurrence); E.B. Michaels v. Mutual Marine Office, Inc., 472 F. Supp. 26 (S.D.N.Y. 1979) (unloading of vessel over nine days in which repeated dropping of

grab-buckets inflicted 200 separate holes in ship's surface held to constitute a single continuous occurrence); Appalachian Ins. Co. v. Liberty Mutual Ins. Co., 687 F. 2d 561 (3d Cir. 1982) (discriminatory employment policies resulting in numerous cases of sex discrimination over a period of time held to constitute a single occurrence); Bartholomew v. Insurance Co. of North America, 502 F. Supp. 246 (D.R.I. 1980), aff'd sub. nom., 655 F.2d 27 (1st Cir. 1981) (sale of faulty carwash equipment that caused repeated damage held to be uninterrupted cause producing "but one occurrence for insurance purposes"); Champion Int'l Corp. v. Continental Cas. Co. (sale of defective paneling installed on 1400 different vehicles held to constitute one occurrence); Union Carbide Corp. v. Travelers Indem. Co., 399 F. Supp. 12 (W.D. Pa. 1975) (multiple sales of defective resin-former oil in bulk quantities resulting in injury held to constitute one occurrence).

C. There Is No Factual Basis To Distinguish Glidden's Sale Of Lead Paint From Air Product's Sale Of Asbestos Products Or Uniroyal's Sale Of Herbicides.

There is no factual basis, especially at the present stage of the underlying litigation, to suggest that Glidden's distribution of lead paint and lead paint pigment was different from the distribution of herbicides, asbestos products, or any other group of products which are delivered on a mass basis through a "routinized, repetitive process." In fact, although

CNA has had over two years to investigate the lead paint claims, CNA admits that it has no information suggesting that Glidden's manufacture and distribution of lead paint and lead paint pigment was not part of a "routine, repetitive process." (See Danforth Ex. L at ¶ 35.) Moreover, CNA admits that it has no information suggesting that Glidden's manufacture or distribution of its lead paint or lead paint pigment products was customized or specially tailored to satisfy the individual requirements of particular customers. (See Danforth Ex. L at ¶ 36.) Additionally, CNA admits that it has no information suggesting that it is possible to identify particular units or batches of Glidden lead paint or lead paint pigment that caused the damage alleged in any one of the underlying claims. (See Danforth Ex. L at ¶¶ 33, 34.)

In short, CNA concedes that it knows of no facts that would distinguish Glidden's distribution of lead paint and lead paint pigment from the similar delivery processes found by the Uniroyal, Diamond Shamrock, Owens-Illinois and Air Products, courts to constitute a single occurrence from which injury resulted in those cases. CNA's admissions establish that it is legally and factually possible that the underlying claims will be found to arise from a single occurrence. The fact that CNA cannot identify any facts to suggest, much less establish, that the alleged injuries in the underlying claims arise out of 99 separate occurrences is fatal to its position. Since CNA cannot

cite facts bringing the lead claims entirely within the asserted limitation on its defense obligations, CNA must defend the lead paint claims on the basis that they arise out of a single occurrence.[4/]

IV. BECAUSE THE UNDERLYING CLAIMS MAY BE FOUND TO HAVE ARISEN FROM A SINGLE OCCURRENCE, CNA WAS REQUIRED TO BEGIN PAYING SCM'S DEFENSE COSTS AFTER SCM HAD ABSORBED ONE SIR.

Once it is determined that each of the Policies is potentially triggered by the underlying claims and that all of the underlying claims may have resulted from a single occurrence, there remains the question of whether more than one SIR applies because more than one policy is potentially triggered. There are several reasons why only one SIR should apply to all of the claims. First, CNA conceded as much when it agreed to pay all defense costs after SCM paid the first $250,000. Second, the application of a single deductible is justified because SCM has pursued a unified defense of all the underlying claims in order to minimize defense costs and its potential liability. Therefore, the cost of defending all of the underlying claims would be the same as the cost of defending the claims that allege possible injury during one or more of the

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4/ If information is later uncovered in the context of the underlying litigation indicating that the underlying claims arose from more than one occurrence or that the underlying claims are not covered under CNA's policies, then CNA may at that time seek a rehearing on its duty to defend. See, e.g., Montrose Chemical Corp. v. Canadian Universal Ins. Co., No. C 594148 (Cal. Super. Ct., Los Angeles Cty. Oct. 2, 1989) (attached hereto as Exhibit _).

CNA policy years. Third, the rationale for the holdings in a number of cases that multiple injuries resulting from one cause arise from a single occurrence is that a single per occurrence deductible will apply regardless of the number of policies involved. See, e.g., Air Products and Chemicals, Inc. v. Hartford Acc. & Indem. Co., supra; Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., supra.

Even if the approach adopted in Air Products and Owens-Illinois were rejected, and the approach taken in cases such as Uniroyal were followed, no more than one SIR per CNA policy should apply. In Uniroyal, Judge Weinstein adopted precisely this approach in estimating the liability arising from injuries occurring in each of consecutive two policy periods that resulted from the same continuous occurrence. He subtracted one SIR per policy from the amount of indemnity coverage plus defense costs allocated to that policy period. 707 F. Supp. at 1393-1394. Such an allocation was possible because resolution of the underlying litigation permitted the parties to stipulate when the injury in the underlying claims occurred. Id. at 1392.

Under this approach, CNA would be required to pay all defense costs above the sum of the SIRs in the triggered Policies. Since SCM has paid defense costs far in excess of the sum of the per occurrence SIR amounts specified in each of the three Policies, CNA is obligated to pay all defense costs on an

ongoing basis. In addition, CNA is obligated to reimburse SCM for costs it incurred in the past in defending the underlying claims, less the SIR amounts that SCM was required to absorb.

Unlike Uniroyal, however, the underlying litigation in this action has not been resolved. It is therefore impossible at this time for the Court to allocate defense costs among the Policies based on the number of claims which trigger each Policy. Moreover, it is not necessary that the Court attempt to allocate defense costs among the Policies because CNA agreed that it would pay defense costs for all of the underlying claims subject to applicable SIRs. CNA further agreed to seek contribution from other SCM carriers whose policies may have been triggered by the underlying claims.[5/] It is only

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5/ CNA is required to pay all defense costs and seek contributions from other SCM carriers not only because it so agreed, but because the law requires it to do so. As discussed in Section I, supra, the duty to defend requires a carrier to pay for the defense of the entire case unless it can show that there is no possibility that its policy will be triggered by any claim in the complaint. See, e.g., International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322, 325, 361 N.Y.S.2d 873, 320 N.E.2d 619, 621 (1974).

Judge Weinstein's adoption of proportional allocation of indemnification and defense cost liabilities in Uniroyal does not permit CNA to allocate defense costs in this case. In Uniroyal, the parties were able to stipulate to the number of injuries falling in each policy period. 707 F. Supp. at 1392. Hence, pro rata allocation among the policies was possible. Moreover, as Judge Weinstein suggested, a "joint and several liability" allocation might be more appropriate where the injuries are continuous over two or more policies. Id. (citing Gruol Construction Co. v. Insurance Co. of North America, 11 Wash. App. 632, 524 P.2d 427, 431 (1974) (when the insured "has sustained damages of a continuing nature, . . . the burden of apportionment is on the carriers").) Because the underlying claims allege injury continuing over two or more CNA Policies, the Uniroyal decision suggests that CNA should be responsible

equitable that CNA take on the burden of establishing the appropriate allocation scheme. If carriers are permitted to refuse payment on the grounds that another carrier is responsible, SCM would be left with no coverage at all.

SCM has spent approximately $2 million on the defense of the underlying lead paint claims. (Friedman Aff. at ¶ __.) By contrast, the SIR amounts that SCM was required to absorb under the three CNA policies total only $575,000. The Policy covering the years 1976-1978, originally provided for an SIR of $25,000. However, the SIR was increased to $100,000 in 1977. Therefore, the SIR applicable to the 1976-1979 policy period should be $75,000, i.e., the average of the SIR amounts applicable in each of the three policy years. The Policy covering the years 1979-1981, provides for a $250,000 SIR. The Policy covering the years 1982-1984 also provides for an SIR of $250,000. Based on these figures, CNA's duty to defend ripened, at the latest when SCM had incurred $575,000 in defense costs, the sum of the SIRs applicable to each Policy.

CNA's duty to defend beyond the SIR amounts encompasses all defense costs except with regard to claims alleging or permitting proof of injury solely during the 1979, 1980 and 1981

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for paying all SCM's defense costs and seeking contribution from other carriers where appropriate.

policy years.[6/] Under the Claim Service Agreements applicable to those years, CNA is obligated to pay defense costs above $250,000 on a "pro rata" basis. (See Danforth Ex. F, G, H at ¶ 5.) In other words, under the 1979, 1980 and 1981 Claim Service Agreements, the defense costs in excess of $250,000 for the claims alleging possible injury during the 1979-1981 policy period would be apportioned between SCM and CNA. Consistent with CNA's 1976-1979 Policy, which provides for apportionment of allocated claim expenses "between the insured and the Company in proportion to the amount of the self-insured retention and the total amount . . . paid in satisfaction of a claim," the defense costs in excess of $250,000 should be apportioned between SCM and CNA in the same proportion that the SIR bears to the claim demand. (See Danforth Ex. B at Endorsement No. 30.) In short, because the underlying lead paint claims may be found to have arisen from a single occurrence and may be found to have triggered each of CNA's Policies, CNA was required under its Policies to begin paying for the lead paint defense at the time

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6/ Although the 1978 Claim Service Agreement provides that SCM shall be responsible for "the incurring of allocated claim expenses," none of the underlying claims falls solely in 1978. The underlying claims which allege possible injury in 1978 also permit proof that injury resulted in other years. (See Friedman Aff. at ¶ __.) Therefore, the Claim Service Agreements which require CNA to pay allocated claim expenses beyond the applicable SIR amount would require CNA to pay defense costs for those claims which allege possible injury in 1978.

SCM had incurred $525,000 in defense costs. CNA's refusal to do so amounts to a breach of its Policy obligations.

CONCLUSION

As demonstrated above, it is possible that the underlying claims will trigger each of CNA's Policies. It is also possible that all the underlying claims will be determined to have arisen from a single occurrence. Therefore, CNA is obligated to pay all of SCM's defense costs for the underlying claims in excess of one SIR per policy, or $575,000 in total. Because SCM has already spent far more than $575,000 in defending the underlying claims, CNA is obligated (a) to pay SCM's defense costs on an ongoing basis and (b) to reimburse SCM for the defense costs SCM already has paid out less $575,000.

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