

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN WATERLOO DIVISION**

GENERAL CASUALTY INSURANCE
CO. OF WISCONSIN,

Plaintiff,

vs.

PENN-CO CONSTRUCTION, INC.,

Defendant.

No. C03-2031-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

A. Factual Background

In 1997, defendant Penn-Co Construction, Inc. (“Penn-Co”), a general contractor, entered into a construction contract with the University of Northern Iowa (“UNI”) for the replacement of the roof of UNI’s premier sporting event and entertainment complex—the UNI-Dome. This endeavor was known as the UNI-Dome Replacement/Improvement Phase III (“the Project”) and involved the removal of the existing air suspended cloth dome covering and replacement with a fixed dome consisting of an underlying metal frame covered with sheet metal sheathing over a plywood substrate.

In the fall of 1997, Exterior Sheet Metal (“ESM”), a company specializing in sheet metal roofing, submitted a bid to perform the sheet metal roofing on the exterior surface of the UNI-Dome, and was awarded the subcontract shortly thereafter. On September 23, 1997, ESM entered into a subcontract with general contractor Penn-Co (“subcontract”). One of the requirements of the subcontract was that ESM purchase a surety or performance bond on the project and provide Penn-Co with all pertinent information surrounding the

bond. ESM purchased the requisite bond through Merchants Bonding Company (“Merchants”) on February 2, 1998. The subcontract also required ESM to obtain, maintain and pay for comprehensive general liability insurance against claims for property damage occurring in or about the Project with minimum coverage amounts as specified in the Insurance Rider Addendum to the subcontract. The subcontract further required ESM to defend, indemnify and hold Penn-Co harmless for any damages incurred by Penn-Co arising out of ESM’s work on the Project. Additionally, ESM was required by the subcontract to name Penn-Co as an additional insured on its comprehensive general liability policies of insurance. ESM did procure the following policies from plaintiff General Casualty Insurance Co. of Wisconsin (“General Casualty”): Commercial General Liability Policy (“CGL Policy”) Number CGA0263907, Contractor’s Liability Policy Number (“Contractor’s Policy”) CCX0263907 and Commercial Umbrella Liability Policy Number (“Umbrella Policy”) CCU0263907—which covered the 1998 to 1999 period. ESM also renewed these policies for policy years 1999-2000 and 2000-2001 (collectively, “the policies”).¹ However, ESM did not submit to General Casualty any additional insured certificates, declarations, or endorsements, showing Penn-Co as an additional insured on the 1998-1999 CGL Policy, Umbrella Policy or Contractor’s Policy—or any renewals of those policies.

ESM performed the subcontracted-for work on the UNI-Dome from early summer 1998 through October 1998. Following the first ice storm of the winter, in approximately November 1998, the newly installed roof of the UNI-Dome began to leak. Though ESM made efforts to rectify the situation, the leaks continued to occur and caused the

¹When speaking specifically about a particular policy, the year will be noted: i.e. 1999-2000 Contractor’s Policy; 2000-2001 Umbrella Policy.

cancellation and/or relocation of a host of scheduled sporting events. When sporting events were held at the UNI-Dome, fans sometimes brought umbrellas to avoid being “rained on.” In addition to inconveniencing UNI-Dome patrons, the leaks caused significant water damage to the interior of the UNI-Dome.

Despite Penn-Co’s and ESM’s efforts, the leaks continued into 1999. Eventually, UNI hired Alan Stevens Associates, Inc. (“Alan Stevens”), to review ESM’s work and to provide UNI with a report. The Alan Stevens report issued in July 1999 and alleged that ESM’s work on the roof was defective and caused the leaks, and recommended replacement of 597 sheet metal panels across the roof. ESM’s president, Leif Eng (“Eng”), conceded this recommendation was a “substantial reconstruction of the roof,” but stated that ESM was not about to replace the roof at that point. Penn-Co wrote UNI in a letter dated October 8, 1999, stating that Alan Stevens had told an ESM foreman that “he didn’t think the owner would ever accept the roof.” Plf.’s Statement of Undisputed Facts, Doc. No. 27, at ¶ 23. The letter also indicated that ESM would cease working on the roof issues until further discussions were held and that ESM and Penn-Co felt that “nothing they can do will be good enough” for UNI. *Id.*

On November 3, 1999, Penn-Co wrote Merchants (ESM’s bonding company), providing notice of “a pending claim on the bond because the owner has not accepted the standing seam metal roof and has indicated to Penn-Co Construction that they may not accept it as installed.” *Id.* at ¶ 24. The letter also indicated that “it appears all of the issues cannot be resolved in a manner [UNI] and Alan Stevens find satisfactory.” *Id.* Merchants responded via a November 8, 1999, letter indicating receipt of Penn-Co’s letter and stating that it was investigating the issue.

During the same time frame, Eng retained legal counsel to represent ESM. On November 12, 1999, ESM’s attorney wrote to Penn-Co and UNI, requesting that ESM’s

counsel be “informed of the status of discussions and/or any arbitration between the owner and Penn-Co regarding final acceptance of the [P]roject.” The letter discussed and denied any alleged deficiencies in ESM’s work and stated, “[a]ny attempts to hold Exterior Sheet Metal liable for alleged design deficiencies of the UNI dome roof will be vigorously resisted.” On November 17, 1999, Mr. Dave Lenss, Regional Manager for Penn-Co, wrote to ESM’s counsel and stated that Penn-Co was mediating the outstanding issues with UNI.

On November 23, 1999, the UNI-Dome again leaked after a rainstorm, and Penn-Co requested ESM repair the reported leaks—which ESM attempted to do. On November 29, 1999, UNI wrote Penn-Co about ESM’s November 23rd repairs, stating that UNI considered them temporary solutions and that UNI required a “proper long term repair” of the leaks. *Id.* at ¶30. On December 3 and 6, 1999, the UNI-Dome leaked following “light showers”—again requiring Penn-Co to contact ESM to attempt to fix the reported leaks. The roof continued to leak repeatedly in 1999 and through the spring of 2000.

The parties agreed to submit disputes over the UNI-Dome roof to a mediator. UNI and Penn-Co entered into alternative dispute resolution. On December 13, 1999, the mediator issued an 84-page report referring to over 1,000 pages of exhibits and containing an 18-page allocation of damages.

On April 21, 2000, Eng, at the direction of Penn-Co, offered by letter his opinions about the cause of the roof leaks to Robert Zahner (“Zahner”), an architectural sheet metal expert hired by Penn-Co. Eng sent Zahner “as built” and shop drawings with his letter. Zahner met with ESM’s foreperson of the Project, Kent Risbeck, at the UNI Dome within a month of Eng’s letter. Zahner used the information he gathered from ESM to create a report about the UNI Dome roof, which he forwarded to Penn-Co but not to ESM.

1. UNI v. Penn-Co and Penn-Co v. ESM (the “underlying action”)

On July 21, 2000, the State Board of Regents and UNI filed a lawsuit against Penn-Co and certain design individuals in the Iowa District Court for Black Hawk County (the “underlying action”). The Petition at Law sought damages based on the theories of breach of contract, negligence, and breach of express and implied warranties arising out of the construction of the UNI-Dome roof. On September 27, 2000, John Mirchich, UNI’s Associate Director of Construction Administration, wrote to Penn-Co’s bond holder, United States Fidelity and Guaranty Company (“USF&G”) and notified USF&G of UNI’s intent to terminate the contract.

On May 3, 2001, UNI filed an amended Petition at Law, including additional damages attributable to property damage resulting from the roof leaks. Specifically, the amended Petition at Law alleged the roof leaks caused water damage to the interior of the UNI-Dome including the seats, floor, football field, and track, to the integrity of the structural components, and to the sound, electrical, and lighting systems. UNI also sought damages as a result of lost revenues resulting from the cancellation of numerous sporting events and other community activities due to the continual leaking of the UNI-Dome roof.

In May 2001, Penn-Co filed a third-party action against ESM. On May 4, 2001, ESM tendered the defense of the UNI and Penn-Co claims to General Casualty. ESM’s notice to General Casualty stated there was an “occurrence” on April 1, 2000. In a letter dated June 6, 2001, to ESM’s counsel, Penn-Co tendered the defense of the suit to: (1) ESM, under the subcontract language; (2) Merchants, pursuant to the bond; and (3) General Casualty, under the additional insured endorsement ESM was required to obtain under the subcontract.

On October 5, 2001, General Casualty denied ESM’s tender of defense, refusing to either defend or indemnify ESM with respect to the claims asserted by UNI and/or

Penn-Co. General Casualty stated it denied coverage because: (1) the claim by UNI and/or Penn-Co did not regard “property damage” caused by an “occurrence;” (2) various exclusions applied; and (3) General Casualty received late notice.

On November 21, 2002, Penn-Co received from UNI a break-down of its damages, which showed that the bulk of damages were for the damaged roof in the form of (1) consulting fees to review ESM’s allegedly defective work and plan for remedial work, and (2) past and future remedial work. Penn-Co utilized this pleading to formulate the basis of its January 23, 2003 damages summary.

In February 2003, Penn-Co moved for partial summary judgment on UNI’s negligence claims. On February 13, 2003, the Honorable Stephen C. Clarke of the Iowa District Court for Black Hawk County granted Penn-Co’s motion, finding UNI’s action against Penn-Co must be limited to its contract claims. Judge Clarke further opined, “[r]ecovery in tort is generally available when the harm results from a sudden or dangerous occurrence, frequently involving some violence or general hazard in the nature of the product defect.” Judge Clarke determined, “[t]he losses pointed to by [UNI—injury to a patron and property damage to exterior sidewalks, streets and walking plazas outside of the Project—]were merely a foreseeable result from the failure of the construction to ‘perform’ in the manner in which it was intended and is not sufficient to take this cause of action outside the contract and into tort.”

On May 13, 2003, following another motion for partial summary judgment by Penn-Co, Judge Clarke dismissed UNI’s claims for “lost opportunity costs,” in which UNI sought to recover \$5.3 million in income UNI had to spend on remedial costs. Judge Clarke also determined UNI’s claims for financing costs for the nearly \$5.1 million borrowed to “complete repairs allegedly caused by defects in the defendant’s work” could be recovered as items of damage in the contract action.

On May 21, 2003, Penn-Co wrote to UNI's counsel, advising that it believed UNI's case had been weakened substantially by the grant of Penn-Co's motions for partial summary judgment. As of May 21, 2003, the only claims remaining against Penn-Co were for damages for breach of contract, which included "consequential damages" in the amount of \$272,549 in lost revenue.

Effective September 17, 2003,² Penn-Co and ESM entered into a stipulated settlement of the third-party claims pursuant to *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) ("Stipulated Settlement"). The Stipulated Settlement states that "after full reflection upon the facts and law bearing upon this matter, and the risks presented, that \$1,655,322.50 constitutes a reasonable valuation of the exposure to ESM under the circumstances." The figure is not apportioned between "covered" and "non-covered" losses. As part of the Stipulated Settlement, Penn-Co agreed *not* to try and collect the judgment from ESM or Merchants, and rather agreed *only* to seek to satisfy this judgment against General Casualty and/or SECURA (ESM's other insurance carrier). The settlement also expressly states that it is to be interpreted and governed by Minnesota law.

On October 13, 2003, Penn-Co, ESM, and two other subcontractors, entered into a Mutual Release and Settlement Agreement ("Settlement Agreement"), in which they agreed that Penn-Co should pay UNI \$1,400,000 for settlement of the remaining claims in the underlying action. Of the \$1,400,000, Penn-Co's contribution was \$550,000 and

²Though the Stipulated Settlement was effective September 17, 2003, it was not filed with the Black Hawk County court until December 4, 2003. Subsequent to its filing, Judge Clarke entered judgment in accordance with the terms of the settlement on June 10, 2004.

ESM and Merchants' collective contribution was \$700,000.³ The Settlement Agreement states that these payments "are attributable to the resultant damage from the roof leaks that occurred on the Project."

On December 4, 2003, UNI and Penn-Co entered into a settlement agreement, in which Penn-Co agreed to pay \$1,400,000 to UNI. The Settlement Agreement states, "[i]t is expressly understood that the amount settled on between UNI and Penn-Co will consist, in part, of damages the University allegedly suffered as a result of the leaks from the roof and not to the alleged damage to the roof itself."

2. General Casualty v. ESM

On December 14, 2001, General Casualty filed a Complaint for Declaratory Judgment in this court, asking the court to declare the respective rights and responsibilities of General Casualty and ESM, and specifically seeking a court order supporting its denial of any claimed duty to defend ESM under the insurance policies it issued to ESM. Eventually, the parties filed cross-motions for summary judgment, and consented to exercise of jurisdiction by United States Chief Magistrate Judge John A. Jarvey ("Judge Jarvey").

On December 24, 2002, Judge Jarvey entered a detailed order on the many contested issues raised by the cross-motions for summary judgment ("December 24, 2002, Order"). *General Casualty Insurance Companies v. Exterior Sheet Metal, Inc.*, C01-2085, 2002 WL 32172280 (N.D. Iowa Dec. 24, 2002) ("*General Casualty I*"). The first issue was whether the damage to the interior of the UNI-Dome due to leaking following ice storms constituted "property damage" caused by an "occurrence" and was covered under

³The difference between the \$1,400,000 figure and those amounts contributed by Penn-Co and ESM/Merchants was contributed by two other subcontractors against which Penn-Co had also asserted third-party claims in the underlying action.

the CGL Policy. The CGL Policy defined an “occurrence” as an “accident, including continuous or repeated exposure to substantially the same general conditions.” *Id.* at *2. As the CGL Policy did not include a definition for “accident,” Judge Jarvey looked to the definition the Iowa Supreme Court accorded the term “accident” in insurance policies. After examining Iowa case law and noting that ESM was charged *only* with negligence in Penn-Co’s third-party complaint, Judge Jarvey concluded that “negligence resulting in damage to property other than that which had work performed on it constitutes an ‘accident’ within the meaning of the policy” and that it was “unlikely that ESM expected and intended the damage to the interior of the UNI-Dome or that UNI would lose the use of their facility as a result of their faulty workmanship on the roof.” *Id.* at *6-7. Ultimately, Judge Jarvey held that:

after looking at the [CGL Policy] as a whole, the damage done to the roof cannot constitute an ‘occurrence’ but the consequential damages that resulted from the faulty workmanship done on the roof by ESM did constitute an ‘occurrence’ under the terms of the [CGL Policy].

Id. at *7.

Judge Jarvey next turned to General Casualty’s contention that two exceptions in the CGL Policy limited ESM’s coverage for the type of damages at issue. Judge Jarvey found that while the ‘business risk’ exclusion “unambiguously exclude[d] coverage as to damage done to that property on which the workmanship was faulty,” it did not “relieve General Casualty of liability for damages to property other than the roof itself.” *Id.* at *8-9. Next, Judge Jarvey found the ‘intentional acts exclusion’ inapplicable as there was “no evidence that ESM intended or expected these damages to result from its faulty workmanship.” *Id.* at *9. On the final issue—whether ESM had provided notice of an “occurrence” as required by the CGL Policy—Judge Jarvey denied both cross-motions for

summary judgment, concluding that a genuine issue of material fact had been generated as to whether ESM substantially complied with the notice requirements and/or whether General Casualty was prejudiced by any delay on ESM's part in providing notice. *Id.* at *10-13.

The action proceeded to a bench trial on the issue of ESM's compliance with the notice provision contained in the policy. On March 30, 2004, Magistrate Judge Jarvey determined ESM met its burden of showing substantial compliance with the notice provision of the policy and of showing a lack of prejudice to General Casualty. Judge Jarvey made the following specific findings:

1. The damages caused to the roof itself is not "property damage" caused by an occurrence within the meaning of the policy at issue herein.
2. Damages to all other property in the building constitute "property damage" caused by an "occurrence" within the meaning of the policy.
3. The business risk exclusion in the policy applies only to damages to the roof itself. The provision does not exclude coverage for damage to property other than the roof itself.
4. Coverage in this case is not excluded as property damage "expected or intended from the standpoint of the insured." (intentional acts exclusion).
5. Exterior Sheet Metal has met its burden to show substantial compliance with the notice provision of the policy and to show lack of prejudice to the insurer.
6. Accordingly, General Casualty shall defend and indemnify Exterior Sheet Metal as set forth herein.
7. Defendant shall recover from Plaintiff its costs of action.

Defendant's Appendix in Support of Motion for Summary Judgment ("Deft.'s App."),

Doc. No. 26, Judgment in a Civil Case, Exh. 2, at 1-2. Following the entry of judgment against it, General Casualty appealed the judgment to the Eighth Circuit Court of Appeals. General Casualty later dismissed its appeal after it resolved its dispute with ESM.

B. Procedural Background

On June 16, 2003, General Casualty filed a Complaint for Declaratory Judgment in this court, asking the court to declare that the 1998-1999 CGL Policy, 1998-1999 Contractor's Policy and 1998-1999 Umbrella Policy procured by ESM do *not* require General Casualty to defend and indemnify Penn-Co, and do not provide coverage for the damages claimed by UNI for Penn-Co's alleged acts, and further that General Casualty is not required to reimburse any judgment against Penn-Co or any settlement entered into by Penn-Co in resolution of UNI's claims. (Doc. No. 1). On October 23, 2003, Penn-Co filed its Answer and Counterclaim in which it denied the substance of General Casualty's allegations and asserted two counterclaims: (1) declaratory relief that General Casualty owes a defense to Penn-Co under the 1998-1999, 1999-2000, and 2000-2001 versions of the policies; and (2) breach of contract. (Doc. No. 4).

On September 15, 2004, Penn-Co and General Casualty filed cross-motions for summary judgment. (Doc. Nos. 26 & 27). General Casualty asserted entitlement to summary judgment on six grounds: (1) Penn-Co is not an 'Additional Insured' on any of ESM's policies with General Casualty; (2) none of the policies provide coverage as the property damage was not caused by an "occurrence"; (3) Penn-Co is not entitled to coverage or defense of the underlying action because the policies did not cover the only remaining claim against Penn-Co: breach of contract; (4) Penn-Co is not entitled to coverage or defense of the underlying action because the General Casualty policies do not provide primary insurance coverage to Penn-Co; (5) Penn-Co is not entitled to coverage

or defense of the underlying action because it failed to substantially comply with the condition precedent of notice; and (6) in the event Penn-Co is entitled to coverage or defense of the underlying action, the damage should be allocated to provide coverage only for covered losses. (Doc. No. 27). Generally, Penn-Co claimed entitlement to summary judgment on three grounds: (1) General Casualty's claims in this suit are barred by the issue preclusive effect of the December 24, 2002, Order; (2) in *General Casualty I*, the court already ruled that General Casualty was required to provide a defense to Penn-Co in the underlying action; and (3) as General Casualty's failure to defend resulted in Penn-Co entering into the Stipulated Settlement agreement with ESM, Penn-Co is entitled to judgment against General Casualty for \$1,655,322.50 plus the costs incurred by Penn-Co in this litigation. (Doc. No. 26). General Casualty filed its resistance to Penn-Co's motion for summary judgment on October 12, 2004. (Doc. No. 36). Penn-Co filed a Reply Brief In Further Support of Its Motion for Summary Judgment on October 18, 2004, (Doc. No. 40), and a resistance to General Casualty's motion for summary judgment on October 27, 2004. (Doc. No. 43). Finally, General Casualty filed a reply to Penn-Co's resistance to its motion for summary judgment on November 5, 2004. (Doc. No. 55). The matter was originally set for a bench trial on January 27, 2005, before United States District Court Judge Linda R. Reade. On January 20, 2005, this case was reassigned from Judge Reade to the undersigned. In light of the continuance of the trial date, and reassigning of the case, General Casualty requested, and was granted, leave to file a supplemental brief and appendix in support of its motion for summary judgment, on February 1, 2005. (Doc. No. 61). With leave of the court, Penn-Co filed a resistance to General Casualty's supplemental brief on February 15, 2005. (Doc. No. 64). On February 17, 2005, General Casualty filed a second supplemental appendix containing the 1999-2000 versions of the Contractor's Policy, CGL Policy and Umbrella Policy. (Doc. No. 65).

Telephonic oral arguments on the cross-motions for summary judgment were held on February 18, 2005. At oral argument, General Casualty was represented by Sean W. McPartland of Lynch Dallas, P.C. in Cedar Rapids, Iowa. Penn-Co was represented by Eric J. Strobel of Hinshaw & Culbertson, L.L.P. in Minneapolis, Minnesota, and Jeffrey Stone of Whitfield & Eddy, P.L.C., in Des Moines, Iowa. In this matter, counsel for both parties submitted exceptionally well-drafted briefs, and thorough and thoughtful oral argument on the issues raised by the summary judgment motions. The matter is now fully submitted and ready for a determination by this court.

II. LEGAL ANALYSIS

A. Summary Judgment Standards

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Federal Rule of Civil Procedure 56 in a number of prior decisions. *See, e.g., Kaydon Acquisition Corp. v. Custum Mfg., Inc.*, 301 F. Supp. 2d 945, 952 (N.D. Iowa 2004); *Wells Dairy, Inc. v. Travelers Indemnity Co. of Illinois*, 241 F. Supp. 2d 945, 958-59 (N.D. Iowa 2003); *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. # 1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, 531 U.S. 820, 121 S. Ct. 61, 148 L. Ed. 2d 28 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir.2000) (Table op.). Thus, the court will not consider those standards in detail here. Suffice it to say that Rule 56 itself provides, in pertinent part, as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim is asserted may, at any time, move for summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). As to whether a factual dispute is “material,” the Supreme Court has explained, “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is “entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*,

477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same). A case in which the issues involved are primarily questions of law “is particularly appropriate for summary judgment.” *TeamBank, N.A. v. McClure*, 279 F.3d 614, 617 (8th Cir. 2002) (citing *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769, 775 (8th Cir. 2001)); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Shirley*, 96 F.3d 1108, 1111 (8th Cir. 1996) (“Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.”); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996) (same). With these standards in mind, the court turns to consideration of the parties’ cross-motions for summary judgment.

B. Choice Of Law

Although the parties did not raise the issue, evidently implicitly agreeing that Iowa law controls, the first question is what law controls the interpretation of the policies. A federal court sitting in diversity must apply the choice of law rules of the forum state—in this case, Iowa. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Iowa law, in turn, employs the Second Restatement’s “most significant relationship” test to determine which state’s law will govern a contract’s interpretation. *See, e.g., Walker v. State Farm Mut. Auto. Ins. Co.*, 973 F.2d 634, 637 (8th Cir. 1992) (recognizing that Iowa had “adopted the Second Restatement of Conflicts as its choice-of-law provision,” and that the Second Restatement “applies the law of the state with the most significant interests in the litigation.”); *Veasley v. CRST Int’l, Inc.*, 553

N.W.2d 896, 897 (Iowa 1997) (recognizing Iowa’s adoption of the “most significant relationship” test); *Cameron v. Hardisty*, 407 N.W.2d 595, 597 (Iowa 1987) (same); *Cole v. State Auto. & Cas. Underwriters*, 296 N.W.2d 779, 781-82 (Iowa 1980) (same). Here, the court concludes that Iowa has the most significant relationship to this case for choice of law purposes because the events giving rise to this litigation occurred in Iowa, the subject matter of the subcontract which required ESM to add Penn-Co to the policies was to be performed in Iowa, and the relationship of the parties in this dispute centers around Iowa. Accordingly, the court will apply the substantive law of Iowa in determining whether General Casualty had a duty to defend or indemnify Penn-Co under the terms of the policies in question. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 188 (absent a choice by the parties, court should consider place of contracting, of negotiation, of performance, of contract’s subject matter, and parties’ domiciles, residences, nationalities, places of incorporation and places of business).

C. Interpreting And Construing Insurance Contracts Under Iowa Law

As many of the issues raised by the parties in their cross-motions from summary judgment turn on an interpretation of the insurance policies in question, a brief discussion of the principles governing insurance contract interpretation under Iowa law is warranted. Under Iowa law, the policy must be construed as a whole, giving its terms their ordinary, not technical, meaning. *Id.*; *see Lee County v. IASD Health Serv. Corp.*, 2000 WL 290367 at *4 (Iowa 2000); *AMCO Ins. Co. v. Rossman*, 518 N.W.2d 333, 334 (Iowa 1994); *Pappas v. Bever*, 219 N.W.2d 720, 721 (Iowa 1974). Words left undefined by the policy are not given their technical meaning, but rather the ordinary meaning which a reasonable person would accord them. *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 618 (Iowa 1991). In some cases, an objective inquiry into the meaning of

the policy language reveals it is susceptible to two fair interpretations—it is in this instance that this language is deemed ambiguous. *See LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 307 (Iowa 1998) (noting that the test of ambiguity is objection, requiring the court to ask: “Is the language fairly susceptible to two interpretations?”); *Thornton v. Hubill, Inc.*, 571 N.W.2d 30, 33 (Iowa Ct. App. 1997 (“An ambiguity exists when, after application of the pertinent rules of interpretation to the contract language, a genuine uncertainty exists as to which of two reasonable constructions is proper.”)); *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa Ct. App. 1994); *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 618 (“Ambiguity exists if, after the application of pertinent rules of interpretation to the policy, a genuine uncertainty results as to which one of two or more meanings is the proper one.”). A mere disagreement between the parties as to the meaning of a policy term does not equate to ambiguity. *Balzer Bros. v. United Fire & Cas. Co.*, 2000 WL 1027258 at *2 (Iowa Ct. App. 2000); *Tom Riley Law Firm, P.C. v. Tang*, 521 N.W.2d 758, 759 (Iowa Ct. App. 1994); *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 108 (Iowa 1981). The court must be diligent in according the policy language only its ordinary and natural interpretation, and must not “give a strained or unnatural reading to the words of the policy to create ambiguity where there is none.” *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995), *overruled on other grounds by Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 784 (Iowa 2000). It is fundamental that where a term is ambiguous, the interpretation most favorable to the insured must be adopted due to the adhesive nature of insurance policies. *Balzer Bros.*, 2000 WL 1027258 at *2; *Joffer*, 574 N.W.2d at 307; *Cincinnati Ins. Co. v. Hopkins Sporting Goods, Inc.*, 522 N.W.2d 837 (Iowa 1994); *Jensen v. Jefferson County Mut. Ins. Ass’n*, 510 N.W.2d 870, 871 (Iowa 1994); *A.Y. McDonald Indus., Inc.*, 475 N.W.2d at 619; *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 454 (Iowa 1987);

Construction of insurance contracts is *always* a matter of law for the court. *See AMCO Ins. Co.*, 518 N.W.2d at 334; *Jensen*, 510 N.W.2d at 871; *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). In most instances, “interpretation of an insurance policy is a question of law for the court to decide.” *Morgan*, 534 N.W.2d at 99; *see also AMCO Ins. Co.*, 518 N.W.2d at 334; *Voeltz*, 431 N.W.2d at 785. However, interpretation becomes a question of fact where the interpretation depends on “extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence.” *Jensen*, 510 N.W.2d at 871 (citation and quotation omitted); *Voeltz*, 431 N.W.2d at 785. Extrinsic evidence refers to evidence other than the words of the policy. *Utica Mut. Ins. Co. v. Stockdale Agency*, 892 F. Supp. 1179, 1202 (N.D. Iowa 1995); *Jensen*, 510 N.W.2d at 871; *Voeltz*, 431 N.W.2d at 785; *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973) (“‘Thus we have consistently construed policy terms strictly against the insurer and where several interpretations were permissible, we have chosen the one most favorable to the assured.’”) (quoting *Allen v. Metropolitan Life Ins. Co.*, 208 A.2d 638, 644 (N.J. 1965)). The bottom line is that the court must “‘ascertain from [the policy’s words] the intent of the insurer and insured at the time the policy was sold.’” *Utica*, 892 F. Supp. at 1202 (quoting *Jensen*, 510 N.W.2d at 871, in turn quoting *Voeltz*, 431 N.W.2d at 785). This court has delineated, discussed, and applied these Iowa rules of interpretation of insurance contracts on many prior occasions. *See Wells Dairy, Inc. v. Travelers Indemnity Co. of Illinois*, 241 F. Supp. 2d 945, 960-61 (N.D. Iowa 2003); *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Terra Industries, Inc.*, 216 F. Supp. 2d 899, 909-11 (N.D. Iowa 2002); *Terra Industries, Inc. v. Commonwealth Ins. Co. of Am.*, 981 F. Supp. 581, 588 (N.D. Iowa 1997); *Coulter v. CIGNA Property & Cas. Companies.*, 934 F. Supp. 1101, 1114-15 (N.D. Iowa 1996); *Utica*, 892 F. Supp. at 1201-02.

D. Is Penn-Co An “Insured” Under The Policies?

1. Relevant policy provisions

Before delving into the arguments of the parties, or the analysis of the issues in question, a brief overview of the pertinent portions of the policies is necessary to facilitate an understanding of the parties’ positions. Generally, Penn-Co claims it is an “insured” under the language of the 1998-1999, 1999-2000, and 2000-2001 CGL Policies, Umbrella Policies and Contractor’s Policies. The court will combine the analysis of those versions of the policies that contain the same language.

a. 1998-1999 and 1999-2000 Contractor’s Policies

With regard to determining who is an “insured,” the 1998-1999 and 1999-2000 Contractor’s Policies provide, in relevant part:

C. WHO IS AN INSURED

* * *

5. Any person or organization for which you are required:
 - a. By written contract; or
 - b. Because of the issuance or existence of a permit;
To provide coverage of the type afforded by Contractors Liability Coverage for operations performed by you or on your behalf or for facilities you own, rent or control. However, coverage provided by this provision shall not apply:
 - c. To an “occurrence” which takes place prior to the execution or issuance of the contract or permit;
 - d. Unless you:
 - (1) Give us no later than the first day of the policy period the name of any person or organization subject to this provision; or
 - (2) Notify us promptly, upon the execution of a contract or issuance of a permit, of the date such person or organization shall be

included as an insured.

General Casualty's Appendix of Exhibits to Statement of Material Facts To Which No Genuine Issues Are To Be Tried ("Plf.'s App."), Doc. No. 27, at 62-63; Deft.'s Supp. App. at 38-39; Plaintiff's Second Supplement Appendix ("Plf.'s Second Supp. App."), Doc. No. 65, at 512.

b. 2000-2001 Contractor's Policy

The 2000-2001 Contractor's Policy provides the following, in terms of who is an "insured," in relevant part:

C. WHO IS AN INSURED

* * *

5. Any person or organization for whom you are:
 - a. Performing operations when you and such person or organization have agreed in writing in a contract or agreement; or
 - b. Required because of the issuance or existence of a permit;to add such person or organization as an additional insured on your policy. Such person or organization is an additional insured only with respect to their liability arising out of your ongoing operations performed for that insured. However, coverage provided by this provision:
 - a. Shall not apply to an "occurrence" which takes place prior to the execution or issuance of the contract or permit; and
 - b. Ends when your operations for that insured are completed. . . .

Deft.'s Supp. App. at 146, 148.

c. 1998-1999, 1999-2000 & 2000-2001 Umbrella Policies

Insofar as the definition of an "insured," the 1998-1999 Umbrella Policy provides, in relevant part:

SECTION III - WHO IS AN INSURED

* * *

2. Except as provided in **4.** below, each of the following is also an insured:

* * *

- f.** Any person or organization, trustee or estate for which you are obligated by an “insured contract” to provide this type of insurance. This applies, however, only to operations performed by you or on your behalf or to facilities you use.

Def’t.’s Supp. App. at 81-82; Plf.’s App. at 35A-36. In turn, the term “insured contract” is defined by the 1998-1999 Umbrella Policy as follows:

- 8.** “Insured contract” means: . . .
- f.** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury”, “property damage”, “personal injury” or “advertising injury” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;. . . .

Plf.’s App. at 40; Def’t.’s Supp. App. at 86. The 1999-2000 and 2000-2001 Umbrella Policies contain the exact same language as to the definition of an “insured,” and as to the definition of an “insured contract.” Def’t.’s Supp. App. at 231-32, 236; Plf.’s Second Supp. App. at 584.

2. *Arguments of the parties*

a. *General Casualty's argument for summary judgment*

In its motion for summary judgment, General Casualty avers that Penn-Co is not entitled to coverage under any of the policies⁴ as it does not meet the definition of an “Additional Insured” and is not otherwise entitled to “insured” status. Turning first to the Contractor’s Policy, General Casualty claims Penn-Co is not entitled to coverage for a number of reasons: (1) by the terms of the Contractor’s Policy, coverage extends to other insureds only if they are designated in the “Declarations”—and there are no additional insured certificates, declarations or endorsements showing Penn-Co as an additional insured; and (2) by its terms the Contractor’s Policy provides liability coverage to a third party *only* where ESM is required by contract to provide such coverage *and* where ESM “promptly [notifies General Casualty], upon execution of a contract or issuance of a permit, of the date such person or organization shall be included as an insured”—in this case there is such a contract, but there was *no* notice to General Casualty by ESM, or Penn-Co, that Penn-Co was to be included as an additional insured.

Similarly, General Casualty argues that Penn-Co is not an “Insured” under the terms of the Umbrella Policy. Again, General Casualty asserts that Penn-Co could be accorded insured status only if it was so designated in the “Declarations”—which it indisputably is not. Further, the Umbrella Policy provides coverage to third parties only where the insured is “obligated by an ‘insured contract’ to provide this type of insurance”—and the subcontract between ESM and Penn-Co, though requiring workers’ compensation insurance, comprehensive general liability insurance and comprehensive

⁴As General Casualty contends that only the 1998-1999 versions of the policies apply, all references to any specific policy in this subsection are to the 1998-1999 versions only.

automobile liability insurance, does not require the commercial umbrella liability insurance the Umbrella Policy provides. Therefore, as ESM was not required under the subcontract to obtain the type of coverage provided by the Umbrella Policy, by the terms of the Umbrella Policy, Penn-Co cannot be an “insured.” Further, General Casualty argues that as the Umbrella Policy defines an ‘insured contract’ as that which covers only tort liability, Penn-Co is not an insured under the Umbrella Policy as the only remaining claims against it are for breach of contract. In other words, “Penn-Co’s status as an ‘insured’ under the Umbrella [P]olicy cannot rest on its [subcontract] with ESM since that portion of the agreement that indemnifies Penn-Co for breach of contract damages is not an ‘insured contract.’” Plf.’s Brief, Doc. No. 31, at 10. Turning finally to the CGL Policy, General Casualty asserts that Penn-Co is not an “insured” as it is not designated in the “Declarations.” Moreover, unlike the Contractor’s Policy and the Umbrella Policy, the CGL Policy does not include a provision extending coverage to third parties where the insured is required by contract to provide such coverage—therefore, Penn-Co cannot gain “insured” status merely as a result of its subcontract with ESM.

b. Penn-Co’s argument in resistance

In resistance, Penn-Co does *not* dispute General Casualty’s assertion that it was not listed in the “Declarations” of the policies, or that no additional insured certificates, declarations or endorsements showing Penn-Co as an additional insured were provided to General Casualty. However, Penn-Co asserts that regardless of these omissions, the language of the policies still places Penn-Co within the definition of an “insured.” Penn-Co turns first to the Contractor’s Policies, which it argues contain “broad form” additional insurance provisions which automatically provide “insured” status to any entity which ESM contractually agreed to name as an insured under the policy—thereby alleviating the need to specifically add each additional entity. Penn-Co asserts that a look at the *full*

text of the relevant portion of the “Who Is An Insured” section of the 1998-1999 and 1999-2000 Contractor’s Policies demonstrates that Penn-Co’s position is the correct one. Looking to that section, Penn-Co argues that the exclusionary language found in subsections (c) & (d) must be read conjunctively as a single exclusion with two parts, not disjunctively as two separate exclusions as advocated by General Casualty. Under Penn-Co’s rationale, the notice requirement of subsection (d) *only applies* where coverage for an “occurrence” prior to execution of the agreement is sought. Penn-Co asserts that when properly construed “paragraph 5 extends automatic insured status to any party with whom ESM had a contract requiring such status and allows ESM to specify that the additional insured can obtain additional coverage for claims arising out of property damage for occurrences happening prior to the date of the contract.” Deft.’s Resistance, Doc. No. 43, at 5. Under this rationale, Penn-Co argues that as the “occurrence” for which coverage is sought did not occur before the subcontract was executed, subsections (c) & (d) are wholly inapplicable in determining Penn-Co’s status under the Contractor’s Policies. Penn-Co also takes the position that General Casualty wrongfully reads a disjunctive modifier in between subsections (c) & (d) where no such disjunctive modifier exists. Penn-Co additionally asserts that looking at the Contractor’s Policies, as a whole, it is evident that when General Casualty intended to apply subdivisions separately it utilized either a period at the end of the subdivision, or semi-colon followed by either an “and” or an “or” modifier. In comparison, Penn-Co points out that subsections (c) & (d) of paragraph 5 are separated by a semi-colon *without* a modifier—which indicates that General Casualty intended those subsections be construed *differently* (i.e. conjunctively) than subsections separated by either a period or semi-colon+modifier. Penn-Co avers that to the extent subdivisions (c) & (d) of paragraph 5 are capable of two interpretations—conjunctive or disjunctive—the section is ambiguous, and must be

construed against the insurer, General Casualty. Finally, Penn-Co argues that it is an “insured” under the 2000-2001 Contractor’s Policy, which expressly provides automatic coverage to Penn-Co by virtue of the subcontract without necessitating any notice to General Casualty of Penn-Co’s addition to the policy as an “insured.”

Turning to the Umbrella Policies, Penn-Co asserts that General Casualty’s position that the subcontract did not require ESM to provide commercial umbrella liability insurance is just plain incorrect—as demonstrated most succinctly by the Insurance Rider to the subcontract in which ESM agreed to provide a \$3,000,000 commercial umbrella liability policy. Penn-Co avers that the umbrella policy extends coverage to Penn-Co if ESM was required by contract to provide this type of insurance—which the subcontract definitively establishes. Therefore, Penn-Co argues that not only is General Casualty *not* entitled to summary judgment, in fact, Penn-Co *is* entitled to summary judgment as it clearly meets the definition of an “insured” under the Umbrella Policy. Further, Penn-Co argues that it also is entitled to “insured” status under the 1999-2000 and 2000-2001 Umbrella Policies containing the same provision.

In sum, Penn-Co specifically asserts it is entitled to “insured” status under the following policies: 1998-1999 Contractor’s Policy; 1998-1999 Umbrella Policy; 1999-2000 Contractor’s Policy; 1999-2000 Umbrella Policy; 2000-2001 Contractor’s Policy; and 2000-2001 Contractor’s Policy. Penn-Co also generally asserts that it is an “insured,” without any specific argument, under the 1998-1999, 1999-2000 and 2000-2001 CGL Policies.

c. General Casualty's reply

In reply, General Casualty reiterates that it is undisputed that no additional insured endorsements or certificates of insurance identifying Penn-Co as an insured on ESM's policies was ever provided to General Casualty. Further, General Casualty draws on a February 7, 2003, letter from Penn-Co's counsel to Penn-Co's carrier, AON Risk Services Inc. of Minnesota, acknowledging that there are no records of any additional insured endorsements, and admitting that they could not see any language in the policies that would provide Penn-Co with coverage. Turning to Penn-Co's specific arguments, General Casualty first notes that only the Contractor's Policies in effect during the time that losses were allegedly sustained are relevant—and as UNI alleged losses from fall 1998 through spring 2000, the only relevant Contractor's Policies are those for the periods June 1998 - June 1999 and June 1999 - June 2000, which provide for additional insured status pursuant to a written contract only if the named insured promptly notifies General Casualty of the execution of that contract. Further, even the June 2000-June 2001 Contractor's Policy provides that a party's additional insured status terminates when the named insured's operations for the additional insured are completed—and it is undisputed that ESM, the named insured, left the job site in October 1998 except for occasional returns for leak repair and "punch-list" items. Therefore, according to General Casualty, Penn-Co cannot rely on the 2000-2001 Contractor's Policy language as a means by which to elevate it to an "insured" status.

3. *Analysis*

a. *Which policies apply?*

Before determining whether Penn-Co is an “insured” under the policies, the court must first resolve the dispute over *which versions* of those policies apply here—are the 1998-1999, 1999-2000, and 2000-2001 versions of the CGL Policies, Contractor’s Policies and Umbrella Policies applicable, as Penn-Co suggests; or are only the 1998-1999 versions at issue, as General Casualty asserts? Iowa law generally recognizes two types of liability policies in terms of determining if a particular policy was in effect at a specific time:

Liability policies generally fall into two classifications: an “occurrence” policy and a “claims made” policy. The occurrence policy provides coverage if the event insured against (the “occurrence”) takes place within the policy period, regardless of when a claim is made. In contrast, a claims made policy provides coverage only if a claim of the insured’s liability arising from a covered hazard is presented during the policy period. Annotation, *Event as Occurring Within Period of Coverage of “Occurrence” and “Discovery” or “Claims Made” Liability Policies*, 37 A.L.R. 4th 382, 390 (1985).

First Newton Nat’l Bank v. General Casualty Co. of Wis., 426 N.W.2d 618, 623 (Iowa 1988). So, unlike a “claims made” policy, an “occurrence” policy “has a ‘tail’ that extends beyond the policy period. The ‘tail’ is the lapse of time between the date of the incident giving rise to liability and the time when a claim is made.” *Hasbrouck v. St. Paul Fire and Marine Ins. Co.*, 511 N.W.2d 364, 366-67 (Iowa 1993).

Reviewing all of the policies, it is clear that they are all “occurrence” policies under Iowa law. The 1998-1999 Contractor’s Policy provides liability coverage for “those sums that the insured becomes legally obligated to pay as damage because of . . . ‘property damage’ . . . [t]hat is caused by an ‘occurrence.’” Deft.’s Supp. App at 32. An “occurrence” is defined as “an accident, including continuous or repeated exposure to

substantially the same general harmful conditions.” *Id.* at 43. The 1998-1999 Contractor’s Policy further states, as to supplement property damage, that “[p]roperty damage’ that is loss of use of tangible property that is not physically injured will be deemed to occur at the time of the ‘occurrence’ that caused it,” Deft.’s Supp. App. at 33. The 1999-2000 and 2000-2001 Contractor’s Policies cover “damages because of . . . ‘property damage’ . . .” if the “‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’; and . . . [t]he . . . ‘property damage’ occurs during the policy period.” Deft.’s Supp. App. at 139; *see* Plf.’s Second Supp. App. at 505 (similar language). “Occurrence” as used in the 2000-2001 Contractor’s Policy has the same definition as in the 1998-1999 and 1999-2000 Contractor’s Policies. *See* Deft.’s Supp. App. at 152; Plf.’s Second Supp. App. at 516. The Contractor’s Policies are clearly framed in terms of when the damage was sustained, not when the claim was submitted. *See First Newton Nat’l Bank*, 426 N.W.2d at 624.

The 1998-1999, 1999-2000, and 2000-2001 Umbrella Policies similarly cover “sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ . . .” but “only if: (1) The ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’; and (2) The ‘bodily injury’ or ‘property damage’ occurs during the policy period.” Deft.’s Supp. App. at 75; Plf.’s Second Supp. App. at 577; Deft.’s Supp. App. at 225. “The ‘occurrence’ may take place anywhere in the world.” *Id.* Identical to the Contractor’s Policies, the Umbrella Policies define an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Deft.’s Supp. App. at 87, 237; Plf.’s Second Supp. App. at 589. Likewise, the CGL Policies contain similar language to both the Contractor’s Policies and Umbrella Policies.

Having found that all of the policies are “occurrence” policies, to determine

whether any particular policy was in effect, the court looks to the time of the occurrence—which is defined as “when the claimant sustained actual damage and not when the act or omission that caused such damage was committed.” *First Newton Nat’l Bank*, 426 N.W.2d at 623; *see Tacker v. American Family Mut. Ins. Co.*, 530 N.W.2d 674, 676 (Iowa 1995) (“The time of ‘occurrence’ is when the claimant sustains damages, not when the act or omission causing the damage takes place.”) (citing *First Newton Nat’l Bank*, 426 N.W.2d at 623); *Lewis v. St. Paul Fire and Marine Ins. Co.*, 452 N.W.2d 386, 388 (Iowa 1990) (citing *First Newton Nat’l Bank* for the same principle). Therefore, at this juncture, the court must simply look to *when* UNI sustained actual damage to determine which policies are relevant to the determination of whether Penn-Co was an insured. The effective dates of each policy are from June 12 through June 12 of the following year. It is undisputed that the roof leaks began in November 1998, when the 1998-1999 policies were in effect. UNI filed its complaint against Penn-Co on July 21, 2000, asserting that “as of the filing of the Petition, the Plaintiffs do not have full knowledge as to the extent of damage to the Project and structure.” *Id.* at 129. In its complaint, UNI also asserted it would almost certainly sustain additional damages to remedy the defects in the roof, and lost revenue during the time that such repairs were made. *Id.* As “the time of the ‘occurrence’ is when the claimant sustained actual damage and not when the act or omission that caused such damage was committed,” *First Newton Nat’l Bank*, 426 N.W.2d at 623, and as, at the time of the filing of UNI’s complaint in July 2000, UNI was still experiencing actual damage as a result of the roof installation, under Iowa law the 1998-1999, 1999-2000, and 2000-2001 CGL Policies, Contractor’s Policies and Umbrella Policies are all at issue in determining whether Penn-Co is an insured.

The court now turns to an examination of whether Penn-Co is an “insured” under the language of the 1998-1999, 1999-2000, and 2000-2001 CGL Policies, 1998-1999,

1999-2000, and 2000-2001 Contractor’s Policies, or the 1998-1999, 1999-2000, and 2000-2001 Umbrella Policies. “Where, as here, neither party offers extrinsic evidence about the meaning of an insurance policy’s language, the construction of the policy and the interpretation of its terms are matters of law for the court to decide.” *John Deere Ins. Co. v. De Smet Ins. Co. of South Dakota*, 650 N.W.2d 601, 606 (Iowa 2002) (citing *Kalell v. Mut. Fire & Auto Ins. Co.*, 471 N.W.2d 865, 867 (Iowa 1991)). Originally the 1999-2000 versions of the Contractor’s Policy and Umbrella Policy were not attached in the parties’ summary judgment appendices, however, upon the court’s inquiry, General Casualty produced the 1999-2000 versions of those policies.

b. Is Penn-Co an “insured” under the 1998-1999 and 1999-2000 Contractor’s Policies?

i. Under the terms of the policy. The 1998-1999 and 1999-2000 Contractor’s Policies provide that an “insured” is [a]ny . . . organization for which you are required . . . [b]y written contract . . . [t]o provide coverage of the type afforded by Contractors Liability Coverage for operations performed by you” Plf.’s App. at 63; Plf.’s Second Supp. App. at 512. The parties do not contest that the subcontract between ESM and Penn-Co is such a written contract requiring ESM to provide the type of coverage afforded by the 1998-1999 and 1999-2000 Contractor’s Policies. The major dispute in this matter revolves around the following language setting forth when coverage shall not apply:

However, coverage provided by this provision shall not apply;

- c. To an “occurrence” which takes place prior to the execution or issuance of the contract or permit;
- d. Unless you:
 - (1) Give us no later than the first day of the policy period the name of any person or organization subject to this provision; or

- (2) Notify us promptly, upon the execution of a contract or issuance of a permit, of the date such person or organization shall be included as an insured.

Plf.'s App. at 63; Plf.'s Second Supp. App. at 512. The big dispute is whether subsections (c) & (d) are read conjunctively or disjunctively in light of the fact that there is no modifier following the semi-colon in subsection (c).

This is not the traditional case in which the meaning of the words of the policy are at issue—in this instance, it is the *lack* of a word that has caused all the ruckus. The first question the court must answer is whether the reading of subsections (c) & (d) of paragraph 5 in the 1998-1999 and 1999-2000 Contractor's Policies is susceptible to two fair interpretations from the perspective of a reasonable person. General Casualty asserts a disjunctive reading, such that the practical effect is that coverage (i.e. "insured" status) is not provided for an "occurrence" that happens before the execution of a contract between the named insured and an otherwise additional insured under subsection (a), and that coverage is also *not* extended unless the insured notifies General Casualty pursuant to either (1) or (2) of subsection (d). This is a fair interpretation of the policy language and is in harmony with the policy as a whole.

Penn-Co asserts that subsections (c) & (d) are read together, as a single exclusion. Clearly, alternatives (1) & (2) of subsection (d), considering the "or" modifier, are read in the alternative. Putting the language in the context Penn-Co suggests yields the following alternatives in which subsection (d) is merely an additional requirement for coverage of an "occurrence" that takes place prior to the execution of the contract:

- [C]overage provided by this provision shall not apply . . . [t]o an "occurrence" which takes place prior to the execution or issuance of the contract or permit . . . [u]nless you . . . give us no later than the

first day of the policy period the name of the person or organization subject to this provision. *Id.* (combining (c)&(d)(1))

- [C]overage provided by this provision shall not apply . . . [t]o an “occurrence” which takes place prior to the execution or issuance of the contract or permit . . . [u]nless you . . . [n]otify us promptly, upon the execution of a contract or issuance of a permit, of the date such person or organization shall be included as an insured. *Id.* (combining (c)&(d)(2)).

The second alternative, resulting from a combination of (c) & (d)(2), is a fair and unstrained interpretation of the contract language, as it is reasonable (though probably unusual in actual practice) for the Contractor’s Policies to allow coverage for an “occurrence” during the Contractor’s Policies’s effective dates, but prior to the execution of a contract between the insured and the third-party, if the insured promptly notified General Casualty upon the execution of the contract as to when the third-party should be included as an insured. However, the first alternative, a combination of (c) & (d)(1), is more troubling. Read conjunctively, as it is laid out above, it would allow coverage for an “occurrence” that happened *both* prior to a contract between the insured and a third-party *and* prior to the effective date of the Contractor’s Policy, so long as the insured notifies General Casualty of the coverage on the first effective date of the Contractor’s Policy. Reading the Contractor’s Policy as a whole, the court is convinced that this is *not* a fair and reasonable interpretation of the policy—for the simple reason that *nowhere* do the 1998-1999 and 1999-2000 Contractor’s Policies provide for coverage of an “occurrence” prior to the effective date of the policy, and they *do* explicitly state that they cover *only* “‘property damage:’ . . . [that] occurs *during the policy period*; and . . . [t]hat is caused by an ‘occurrence.’” Def’t.’s Supp. App. at 32; *see id.* at 33 (providing

supplemental property damage coverage so long as the “property damage” is caused by an “occurrence,” takes place during the policy period and “result[s] from operations which take place away from the insured’s premises and which are a part of your business.”); *accord West Bend Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 624 N.W.2d 422, 424 (Iowa Ct. App. 2001) (“The insurance policy must be construed as a whole; the words used must be given their ordinary, not technical, meaning to achieve a practical and fair interpretation.”). In light of the fact that in no instance do the 1998-1999 and 1999-2000 Contractor’s Policies provide for coverage of an “occurrence” *prior to the policy period*, to read subsections (c) and (d) conjunctively, as Penn-Co proffers, is to “give a strained or unnatural reading to the words of [the 1998-1999 and 1999-2000 Contractor’s Policies] to create ambiguity where there is none.” *Morgan*, 534 N.W.2d at 99. This is one such case in which “the mere fact [that the] parties disagree on the meaning of the terms used does not establish ambiguity.” *Gracey v. Heritage Mut. Ins. Co.*, 518 N.W.2d 372, 373 (Iowa 1994).

In this instance, as the parties have not offered anything beyond the policies themselves to interpret the language of the 1998-1999 and 1999-2000 Contractor’s Policies at issue, the interpretation of the policies is a matter of law to be resolved by this court—and this court holds that considering the 1998-1999 and 1999-2000 Contractor’s Policies as a whole, General Casualty’s interpretation of subsections (c) & (d), that reads in an “or” disjunctive modifier following the semi-colon in subsection (c), is the only practical and fair interpretation of the provisions at issue. *See Holty*, 402 N.W.2d at 454. Therefore, as the notice provisions of subsection (d) were not complied with, Penn-Co does not qualify as an “insured” under paragraph 5, and likewise does not qualify as an “insured” under the 1998-1999 and 1999-2000 Contractor’s Policies.

ii. Penn-Co’s “insured contract” argument. Penn-Co asserts that even if is not an “insured” under the 1998-1999 and 1999-2000 Contractor’s Policies, it is still entitled to recover the costs incurred as a result of General Casualty’s refusal to provide Penn-Co with a defense and indemnity under the “insured contract” provisions of the policy. Penn-Co asserts that the “insured contract” provision provides it with another way to recover insurance for damages arising out of ESM’s work—as by the “insured contract” provision General Casualty insured ESM’s agreement to defend and indemnify Penn-Co in the subcontract. In resistance, General Casualty argues that the “insured contract” provision cited by Penn-Co must be read in conjunction with the “Who Is An Insured” requirement that the insured provide General Casualty with notice of the execution of existence of a contract with a third party in order for that third party to be an “insured” under the policy.

The “insured contract” provision cited by Penn-Co, is the following:

B. EXCLUSIONS

1. Applicable to Contractors Liability Coverage—This insurance does not apply to:

.....

b. “Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion *does not apply* to liability for damages:

(1) Assumed in a contract or agreement that is an “insured contract”. . . .

Deft.’s Supp. App. at 34 (emphasis added); Plf.’s Second Supp. App. at 507. In turn, “insured contract” is defined by the policy as:

That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another party to pay for “bodily injury,” “property damage,”

“personal injury” or “advertising injury” to a third person or organization, if the contract or agreement is made prior to the “bodily injury,” “property damage,” “personal injury” or “advertising injury.” Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Id. at 42. As the quoted language makes clear, liability for damages assumed by the insured in a contract or agreement qualifying as an “insured contract” is not excluded from coverage under the 1998-1999 and 1999-2000 Contractor’s Policies. However, as General Casualty points out, the quoted language does not alter the definition of an “insured” to include coverage for any party with whom an “insured” (i.e. ESM) enters into an “insured contract.” In fact, Penn-Co’s argument does not seem to be that this provision grants Penn-Co “insured” status under the Contractor’s Policies. Rather, Penn-Co’s arguments are geared primarily toward the fact that ESM breached the subcontract by failing to provide Penn-Co with a defense and indemnification and that General Casualty was the reason that ESM breached this contractual duty—therefore, General Casualty must reimburse Penn-Co according to the Stipulated Settlement. Whether General Casualty is bound by the Stipulated Settlement reached by Penn-Co and ESM is a separate inquiry from whether Penn-Co qualifies as an “insured” under the Contractor’s Policies—and is discussed in detail below. At this juncture, it is clear that the provisions cited above in no way change Penn-Co’s status, or in this case lack of status, as an “insured” under the 1998-1999 and 1999-2000 Contractor’s Policies. Ultimately, the court holds that Penn-Co is *not* an “insured” under the 1998-1999 and 1999-2000 Contractor’s Policies, and General Casualty’s motion for summary judgment is **granted in part** to this extent.

c. Is Penn-Co an “insured” under the 2000-2001 Contractor’s Policy?

i. Were ESM’s operations completed before the 2000-2001 Contractor’s Policy went into effect? General Casualty first draws on the exclusionary language of subsection (b) of paragraph 5, contending that the 2000-2001 Contractor’s Policy provides that additional insured status ceases when the named insured’s operations are completed—and it is undisputed that ESM left the job site in October 1998. In support of its position, General Casualty relies on the following language of the 2000-2001 Contractor’s Policy defining who is an “insured” under the policy:

Such person or organization is an additional insured only with respect to their liability arising out of your ongoing operations performed for that insured. However, coverage provided by this provision: . . .

b. Ends when your operations for that insured are completed.

Deft.’s Supp. App. at 148; Plf.’s Reply App. at 446.

The phrase “your operations” is not defined by the 2000-2001 Contractor’s Policy. In the singular tense, “operation” is commonly defined, in this context, as “a business transaction.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 815 (10th ed. 1995); *see also* THE AMERICAN HERITAGE COLLEGE DICTIONARY 957 (3d ed. 1997) (defining “operation,” in terms of both “A process or series of acts involved in a particular form of work” and “An instance or series of acts involved in a particular form of work.”); *accord* *A.Y. McDonald Indus.*, 475 N.W.2d at 618 (recognizing that words left undefined by the policy are given their ordinary meaning from a reasonable person’s perspective, not their technical meaning). The business transaction in this context is clearly ESM’s (the insured’s) subcontract with Penn-Co. The subcontract states that subcontractor (ESM) agrees, in relevant part:

15) To guarantee the Subcontract to the same extent that the Contractor is obligated to guarantee its work under the General Contract, but in any event to guarantee its work against all defects in material or workmanship for a period of one year from the date of acceptance of the Project or a portion thereof by Owner.

16) That in case the Subcontractor shall fail to correct, replace and/or re-execute faulty or defective work and/or materials furnished under this Subcontract, when and if required by the Contractor, or shall fail to complete or diligently proceed with this Subcontract within the time herein provided for, the Contractor upon three days notice in writing to the Subcontractor shall have the right to correct, replace, and/or re-execute such faulty or defective work, or to take over this Subcontract and complete same either through its own employees or through a contractor or subcontractor of its choice, and to charge the cost thereof to the Subcontractor, together with any liquidated damages caused by a delay in the performance of this Subcontract.

Plf.'s App. at 4-5. Therefore, the subcontract (i.e. business transaction) required not only ESM's completion of specific portions of the Project, but also required ESM to guarantee its work for one year following UNI's acceptance (which never did occur) and to correct any faulty or defective work. And, in fact, ESM was subject to significant financial penalties, and possibly litigation for breach of contract, were they not to have responded to reports of leaks in the UNI-Dome roof. The record contains numerous instances in which, following any leakage reports from UNI, Penn-Co would notify ESM of said leaks and ESM would return to the job site to attempt to correct the leakage problems—as required by the terms of the subcontract. *See* Plf.'s App. at 86-93, 265-70. Under the subcontract, ESM's "operations" for Penn-Co were not complete until *at least* the roof replacement was accepted by UNI and the Project was closed out—and there is no dispute

that such an acceptance, in fact, was never forthcoming. Plf.'s App. at 4. Therefore, the court looks to the record to determine when the last time ESM was on the job site in relation to its continuing obligation to repair defects in its work to determine when ESM's operations for Penn-Co ceased. The record contains a letter from Penn-Co to ESM dated *June 15, 2000*, which states:

I have received an E-Mail from the University of Northern Iowa yesterday stating that they continue to experience roof leaks in the standing seam metal roof.

These leaks need to be stopped prior to the football and basketball seasons beginning. *Please take the necessary action to correct the problems with this roof so that the project can be closed out.*

Plf.'s App. at 269 (emphasis added). Therefore, the record establishes that the last time ESM was on the job site to correct leakage problems was sometime after June 15, 2000, yet likely before UNI filed suit on July 21, 2000. The 2000-2001 policies were effective June 12, 2000—before ESM's final return to the job site to attempt to address leakage issues. Therefore, this court finds that ESM's "operations for [Penn-Co] were [not] completed" before the effective date of the 2000-2001 Contractor's Policy, and therefore Penn-Co's claimed insured status is not affected by paragraph C.5.b of the 2000-2001 Contractor's Policy.

ii. Insured status. After reviewing the language of the 2000-2001 Contractor's Policy, Penn-Co clearly falls under the definition of who is an insured. The 2000-2001 Contractor's Policy provides that "[a]ny . . . organization for whom you are . . . [p]erforming operations when you and such . . . organization have agreed in writing in a contract or agreement . . . to add such . . . organization as an additional insured on your policy." Def't.'s Supp. App. at 148. The 2000-2001 Contractor's Policy defines "you" as

“the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy.” *Id.* at 194. The Insurance Rider Addendum to the subcontract between Penn-Co and ESM *clearly and unambiguously* required ESM to add Penn-Co as a primary insured to its liability policies: “Before beginning any work under this subcontract, [ESM] will provide to [Penn-Co] insurance certificate and endorsements showing compliance with these insurance specifications. Penn-Co Construction, Inc., owner and others are additional insureds on a primary basis.” Plf.’s App. at 10. Where a contract requiring an insured add another organization to the policy exists, the 2000-2001 Contractor’s Policy still excludes coverage for an “occurrence” taking place prior to the execution of the contract—this is not the case in this instance. The 2000-2001 Contractor’s Policy also provides that coverage for an additional insured ceases once the insured’s operations are complete—the court dealt with this subsection in detail above, finding that ESM’s “operations” were not complete on the date the 2000-2001 Contractor’s Policy went into effect. Therefore, Penn-Co has met the 2000-2001 Contractor’s Policy requirements for classification as an “insured” under that policy. To this extent, General Casualty’s motion fo summary judgment is **denied in part**.

d. Is Penn-Co an “insured” under the 1998-1999, 1999-2000 & 2000-2001 Umbrella Policies?

The arguments as to Penn-Co’s status, if any, under the Umbrella Policies can be condensed into the following two inquiries: (1) Did the subcontract require ESM to provide the type of coverage offered by the Umbrella Policies; and (2) Is the subcontract an “insured contract” as defined by the Umbrella Policies. The court will address these questions in that order.

In listing the duties of the subcontractor (ESM), the subcontract provides, in relevant part:

7) To obtain, maintain and pay for such worker's compensation insurance as may be required by the General Contract or by law; comprehensive general liability insurance, comprehensive automobile liability insurance, protecting the Subcontractor against claims for bodily injury or death or for damage to property occurring upon, in or about the Project, with limits in the amounts at least equal to those specified in the Insurance Rider Addendum.

Plf.'s App. at 3. The Insurance Rider Addendum, in turn, provides that the "Subcontractor shall obtain insurance with limits at least equal to those specified below" and, among other types of insurance, requires all subcontractors to obtain Umbrella Liability insurance with a limit of at least \$3,000,000. *Id.* at 10. The Umbrella Policies provide coverage for "property damage" caused by an "occurrence" during the policy period. *Id.* at 32. In light of these facts, there is clearly no merit to General Casualty's argument that ESM was not required under the subcontract to procure this type of coverage—in fact, the opposite is true; the subcontract indicates that liability insurance of bodily injury and property damage must be procured by ESM, and the Insurance Rider Addendum clearly indicates that ESM was required to obtain the umbrella liability coverage provided by the Umbrella Policies.

The next inquiry is whether the subcontract is an "insured contract" as defined by the Umbrella Policies—as the Umbrella Policies define an "insured" as an "organization . . . for which you are obligated by an 'insured contract' to provide this type of insurance." Plf.'s App. at 36. The Umbrella Policies define "insured contract," in relevant part, as:

That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury", "property damage", "personal injury" or "advertising injury" to a third person or

organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Deft.'s Supp. App. at 86. General Casualty asserts that the subcontract is not an "insured contract" because following Penn-Co's successful motions for partial summary judgment, only UNI's contractual claims remained against it at the time of settlement—and the portion of the subcontract indemnifying Penn-Co for breach of contract damages does not meet the definition of an "insured contract." In this instance, the court believes that General Casualty misses the mark—while the nature of the viable claims remaining against Penn-Co in the underlying action at the time this suit was initiated could be relevant to whether the Umbrella Policies provide Penn-Co with *coverage*, that is a different inquiry than whether Penn-Co *is an "insured"* under the Umbrella Policies. In addition to the subcontract language requiring ESM to procure certain insurance, and add Penn-Co as a primary insured to that insurance, as set forth above, the subcontract also contains the following language:

The Subcontractor agrees to *assume entire responsibility* and liability for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract or occurring or resulting from the use by the Subcontractor, his agents or employees, of materials, equipment, instrumentalities or other property, whether the same be owned by the Contractor, the Subcontractor or third parties, and the Subcontractor agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims *Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage as will insure the provisions of this paragraph.*

Plf.'s App. at 3 (emphasis added). The subcontract *expressly* required ESM to assume *all*

responsibility for personal injury, bodily injury and property damage—placing the subcontract squarely within the definition of an “insured contract” as defined by the Umbrella Policies. Moreover, the subcontract specifically required ESM to both acquire the liability insurance necessary to comply with this assumption of responsibility, and to acquire and maintain insurance of the types and amounts listed in the Insurance Rider Addendum—which this court has already held requires ESM to obtain umbrella liability coverage of the type the Umbrella Policies provide. For these reasons the court finds that Penn-Co *is* an “insured” under the Umbrella Policies. Insofar as Penn-Co’s status as an “insured” under the Umbrella Policies was raised by General Casualty’s motion for summary judgment, the motion is **denied in part**.

e. The CGL Policies

As Penn-Co generally asserts it is entitled to coverage under “all nine” policies—referring to the 1998-1999, 1999-2000, and 2000-2001 versions of the CGL Policy, Contractor’s Policy and Umbrella Policy—the court will briefly address the language defining an “insured” under the CGL Policies, though Penn-Co offered no specific argument as to coverage under the CGL Policies.

Section II of the (1998-1999, 1999-2000 & 2000-2001) CGL Policies provides:

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as: . . .
 - d. [a]n organization other than a partnership, joint venture or limited liability company you are insured.

Plf.’s App. at 21 (1998-1999); Plf.’s Second Supp. App. 556 (1999-2000); Def’t.’s Supp. App. at 200 (2000-2001). Further, the CGL Policy provides: “No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.”

Plf.'s App. at 22 (1998-1999); Def't.'s Supp. App. at 201 (2000-2001). There is no dispute that no additional insured certificates, declarations or endorsements showing Penn-Co as an additional insured or adding Penn-Co to the "Declarations" were ever executed or provided to General Casualty as to any of ESM's policies, including the CGL Policies. Clearly, as the CGL Policies require designation in the declarations of any organization claiming "insured" status under the policies, Penn-Co does not qualify as an "insured" under any of the CGL Policies. To the extent General Casualty's motion for summary judgment challenges Penn-Co's status as an "insured" under the CGL Policies, it is **granted in part.**

f. Summary

From this point, in addressing the arguments of the parties, it is necessary only to look to those policies under which Penn-Co qualifies as an "insured." In summary, the court has held that Penn-Co is an "insured" under the 2000-2001 Contractor's Policy, the 1998-1999 Umbrella Policy, the 1999-2000 Umbrella Policy, and the 2000-2001 Umbrella Policy. From this point forward, use of the phrase "the policies" refers only to these policies under which Penn-Co has "insured" status.

E. "Other Insurance" Provision

There is much debate between the parties as to whether Penn-Co is a primary insured under the policies—for, if the policies are "excess" to insurance Penn-Co already has, the policies contain language that generally extinguishes any obligation General Casualty might have to indemnify/defend an insured. The court will first set forth the provisions regarding excess insurance embodied in each of the policies under which Penn-Co is an "insured": 1998-1999 Umbrella Policy; 1999-2000 Umbrella Policy, 2000-2001 Umbrella Policy; and the 2000-2001 Contractor's Policy.

1. Relevant policy provisions

a. The Umbrella Policies

The 1998-1999, 1999-2000 and 2000-2001 Umbrella Policies provide the following in terms of coverage where the insured has “other insurance”:

6. Other insurance

If valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part our obligations are limited as follows:

- a. This insurance is excess over any of the other insurance except for other insurance bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part;
- b. When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
 - (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
 - (2) The total of all deductible and self-insured amounts under all that other insurance.

Def’t.’s Supp. App. at 85; Plf.’s Second Supp. App. at 587; Def’t.’s Supp. App. at 235.

b. 2000-2001 Contractor’s Policy

The 2000-2001 Contractor’s Policy contains a paragraph H relating to other insurance:

H. OTHER INSURANCE

- 1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can

collect on it or not. But we will not pay more than the applicable Limit of Insurance.

2. Contractors Liability Coverage is excess over any other insurance that insures for direct physical loss or damage.
3. Contractors Liability Coverage is excess over any other insurance, whether primary, excess, contingent or on any other basis that is purchased by you to cover your liability as a tenant for “property damage” to premises rented to you or temporarily occupied by you with permission of the owner.
4. When this insurance is excess, we will have no duty under Contractors Liability Coverage to defend any claim or “suit” that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so; but we will be entitled to the insured’s rights against all those other insurers.

Deft.’s Supp. App. at 173.

2. *Arguments of the parties*

General Casualty argues that at the time of the Project, and throughout the underlying action, Penn-Co had primary insurance with St. Paul Fire and Marine Insurance Company (“St. Paul”). In support of this assertion, General Casualty points to a “Loan Receipt Agreement” between Penn-Co and St. Paul dated June 20, 2003, which provides that St. Paul and Penn-Co were parties to two insurance contracts (“St. Paul Policies”) with effective dates spanning from November 30, 1998, through November 30, 2000, which “provided certain primary liability insurance to Penn-Co subject to a \$1,000,000 limit of liability.” Plf.’s Supp. App., Doc. No. 61, Exh. C, at 1. The Loan Receipt Agreement also indicates that

Penn Co tendered the defense of the [underlying action] to St.

Paul and St. Paul accepted the defense of Penn Co under a reservation of right to deny coverage for any damages that may be awarded against Penn Co. based on various terms, conditions and exclusions contained within the Policy. St. Paul agreed to retain the law firm of Pinger & Templer to defend Penn Co. and negotiated a reduced fee for defense of the litigation. . . . St. Paul has (sic) advanced to Penn Co significant sums for the defense of Penn Co. relative to the [underlying action]. Penn-Co has also incurred significant expense in the defense of the [underlying action].

Id. at 2. General Casualty points to the “other insurance” clauses in the policies, as detailed above, and claims they render the policies excess to any other insurance. Therefore, even if Penn-Co were an “insured” under the policies, St. Paul was Penn-Co’s primary insurance carrier—extinguishing any duty on the part of General Casualty to defend or indemnify Penn-Co in the underlying action. As the coverage provided by the policies was *at most* excess to Penn-Co’s primary coverage under the St. Paul Policies, General Casualty asserts it is entitled to summary judgment.

In resistance, Penn-Co contends that under the terms of the subcontract, ESM agreed that Penn-Co would be a primary insured on all of the required insurance policies. Penn-Co asserts that General Casualty’s argument relies on a selective reading of the “other insurance” provisions in its policies, and that a *full* reading of those provisions results in a finding that General Casualty’s arguments are nothing more than empty assertions with no factual backing in the record. Penn-Co goes so far as to assert that General Casualty’s arguments amount to a “lack of candor” with the court in light of the fact that the General Casualty policies expressly provide for primary coverage, and in the absence of any evidence that a “‘Fire, Extended Coverage, Builder’s Risk, Installation Risk, or similar coverage’ was applicable to ESM’s work.” Plf.s’ Resistance, Doc. No. 43, at 17. Penn-Co further contends that General Casualty bears the burden of proving

that its “other insurance” provisions apply—and therefore, General Casualty bears the burden of proving that Penn-Co’s St. Paul Policies provide the requisite coverage for ESM’s work under the language in the policies. Penn-Co additionally asserts that General Casualty’s position is based upon the faulty presumption that the St. Paul Policies and the policies at issue here cover the same risk—which they cannot, as the St. Paul Policies cover the risk that Penn-Co would be sued because of its defective work, not the risk that Penn-Co would be sued because of ESM’s defective work. Penn-Co submits that General Casualty’s failure to meet these burdens leads to only one result—a denial of General Casualty’s motion for summary judgment.

In reply, General Casualty argues that regardless of the fact that the subcontract required ESM to add Penn-Co as a primary insured to the policies, ESM did *not*, in fact, do so. General Casualty contends that Penn-Co has failed to provide any documentation to rebut General Casualty’s assertion that the St. Paul Policies were primary as defined by the General Casualty policies. Further, General Casualty alleges that because Penn-Co did not resist General Casualty’s contention that the Umbrella and Contractor’s Policies were in excess of the St. Paul Policies, General Casualty’s contentions must be deemed conceded and its motion for summary judgment granted.

3. Analysis

The *only* record evidence of the St. Paul Policies is contained in the Loan Receipt Agreement attached as Exhibit C to General Casualty’s Supplemental Appendix in Support of its Supplemental Brief, which indicates that the St. Paul Policies, effective November 1998 through November 2000, “provided certain primary liability insurance” to Penn-Co. The Loan Receipt Agreement also indicates that St. Paul accepted Penn-Co’s tender of defense, procured legal counsel on Penn-Co’s behalf, and provided significant funds to assist in Penn-Co’s defense. Further, the Loan Receipt Agreement indicates that Penn-Co

had tendered a defense and indemnification to each of its subcontractors, and that each subcontract had denied the tender of defense. Also contained in the Loan Receipt Agreement is a statement regarding the loan of funds for Penn-Co's defense: "St. Paul is willing to loan Penn Co the funds necessary to pay the attorneys fees, expenses and costs to defend itself against the allegations against it in the Action and Penn Co is willing to accept said loan in satisfaction of St. Paul's contractual obligation pursuant to the Policies to defend Penn Co relative to the Action." In addition to loaning Penn-Co funds, and procuring Penn-Co legal counsel, the Loan Receipt Agreement indicates that a certain portion of the loaned funds are to go towards a settlement with UNI, as well as providing for the order in which any funds generated from Penn-Co's claims against the subcontractors' insurers should be applied. The Loan Receipt Agreement was signed on June 26, 2003.

However, despite the content of the Loan Receipt Agreement, the court is missing vital information (most specifically the St. Paul Policies themselves) necessary to determine whether the "other insurance" provisions are implicated and what, if any, obligation General Casualty had in light of the St. Paul Policies to defend and indemnify Penn-Co in the underlying action. Merely because the subcontract between ESM and Penn-Co required ESM to add Penn-Co as a primary insured to the General Casualty policies does *not* mean that Penn-Co was, in fact, a primary insured under those policies where it is admitted that Penn-Co was never added to the declarations and no additional insured documents were ever filed with General Casualty. On the other hand, just because the Loan Receipt Agreement indicates that the St. Paul Policies provide "certain primary liability insurance" to Penn-Co, there is no indication of precisely *what* the St. Paul Policies covered—so it is impossible to determine whether the St. Paul Policies covered the same risk as the General Casualty policies (i.e. liability arising from ESM's

work). Clearly, the record is not complete enough to support judgment as a matter of law for either party on the application of the “other insurance” provisions. Moreover, the genuine issues of material fact raised by the Loan Receipt Agreement and the General Casualty policy provisions generate genuine issues of material fact preventing entry of summary judgment on this issue—therefore, in this respect, General Casualty’s motion for summary judgment is **denied in part**.

F. General Casualty’s Breach of Contract Argument

In support of its motion for summary judgment, General Casualty asserts that even if the court finds Penn-Co is an “insured” under any of the policies, Penn-Co is not entitled to coverage or defense/indemnification as breach of contract claims, the only live claims remaining at the time Penn-Co and UNI entered into a settlement agreement, are excluded from coverage. In support of its position, General Casualty cites to various portions of the 1998-1999 versions of the policies, which General Casualty claims demonstrate that there is no coverage for breach of contract. Predictably, Penn-Co resists this argument, claiming that Judge Jarvey, in *General Casualty I*, rejected this same argument when he found that the claims by Penn-Co against ESM—which Penn-Co avers are the *same* as the claims asserted by UNI against Penn-Co in the underlying action—were covered claims under these very same policies. Penn-Co asserts that General Casualty’s argument “effectively is asking this Court to reconsider its prior holdings, under the guise of an argument that the claims against Penn-Co are somehow different than the claims were against ESM.” Plf.’s Resistance, Doc. No. 43, at 12.

General Casualty’s argument can be dismissed in relatively short order. Under Iowa law

[a]n insurer has a duty to defend whenever there is potential or

possible liability to indemnify the insured based on the facts appearing at the outset of the case. *First Newton Nat. Bank v. General Cas. Co.*, 426 N.W.2d 618, 623 (Iowa 1988). We look first and primarily to the petition for the facts at the outset of the case. *Id.* When necessary, we expand our scope of inquiry to any other admissible and relevant facts in the record. *Id.* Such expansion is especially necessary under “notice pleading” petitions which often give few facts upon which to assess an insurer's duty to defend. *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 119 (Iowa 1984). An insurer cannot await the outcome of the trial to furnish the defense if potential liability appears at an earlier stage. *Id.* “On the other hand, an insurer is not required to provide a defense when no facts presently available to it indicate coverage of the claim merely because such facts might later be added by amendment or introduced as evidence at the trial.” *Id.*

First Nat'l Bank of Missouri Valley v. Fidelity & Deposit Co. of Maryland, 545 N.W.2d 332, 335 (Iowa Ct. App. 1996); see *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Companies*, 246 F.3d 1132, 1136 (8th Cir. 2001) (stating that determination of whether a duty to defend exists is accomplished by looking to the petition and deciding whether the allegations bring the claim within liability coverage); *Fremont Indem. Co. v. Tolton*, 2001 WL 1678773, at *2 (S.D. Iowa Nov. 29, 2001) (same); *Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co.*, 591 N.W.2d 17, 18 (Iowa 1999) (same). “In other words, the duty to defend rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage.” *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 627 (Iowa 1991); see also *Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 825 (Iowa 1987) (recognizing that the duty to defend “arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case and is not dependent on the probable liability to pay based on the

facts ascertained through trial.”) (emphasis added). “Whether the relevant facts trigger the duty to defend depends, of course, on the actual language of the insurance contract and its interpretation.” *Norwalk Ready Mixed Concrete*, 246 F.3d at 1136.

Therefore, General Casualty’s duty to defend and indemnify was triggered at the time the petition was filed, not after dispositive motions weeded out some claims or on the eve of settlement between the parties. In the underlying action, UNI’s petition asserted claims of breach of contract, negligence, and breach of express and implied warranties arising out of the construction of the UNI-Dome roof against Penn-Co. Clearly, the “facts appearing at the outset of the case indicate that the bulk of the claims against Penn-Co were covered by ESM’s policies with General Casualty, as there is *no* dispute that the negligence and/or breach of express and implied warranty claims are covered by the policies. The court, like Penn-Co, finds this argument unpersuasive, and to that extent **denies in part** General Casualty’s motion for summary judgment on this ground.

G. Preclusion

1. Arguments of the parties

Penn-Co argues that the issue of whether, in the underlying action, UNI sought damages for ‘property damage’ caused by an ‘occurrence,’ as defined by the General Casualty policies obtained by ESM is precluded by the December 24, 2002, Order. Therefore, Penn-Co here seeks to offensively use the December 24, 2002, Order to prevent General Casualty from arguing otherwise in this instance. Penn-Co contends that all four factors necessary for the December 24, 2002, Order to have an issue preclusive effect are present in this case. First, Penn-Co claims that the issues to be resolved are identical—namely, that the issues arose out of the same common nucleus of fact, and that the wrong for which redress is sought is the same in both actions. Second, Penn-Co

asserts that the issues were raised and litigated in the prior action—specifically, the issue of whether General Casualty owes its insured a defense and indemnification under the policies, which hinged on whether UNI suffered ‘property damage’ as a result of an ‘occurrence.’ Third, the determination of whether the damage suffered by UNI was an “occurrence” under the policies was material and relevant to answer the question of whether General Casualty had a duty, created under the policies, to defend and indemnify its insured. Finally, determination of whether UNI suffered ‘property damage’ resulting from an “occurrence” was dispositive of the outcome of the December 24, 2004, Order. As all of the requisite factors necessary for an issue preclusive effect to attach to the December 24, 2002, Order, are present, Penn-Co argues that General Casualty should be collaterally estopped from relitigating the issue of whether it owes a defense to its insureds—specifically, Penn-Co.

General Casualty resists, claiming that the issues determined in the prior suit are *not* identical to those at issue here. Most importantly, General Casualty asserts, is the fact that the issue of whether Penn-Co provided notice to General Casualty as soon as practical in accordance with the policies, is not identical to whether ESM provided the requisite notice. General Casualty first points out that ESM was not given notice of the claim until after Penn-Co gave notice to Merchants of a possible claim on the bond in November 27, 2000. Unlike ESM, Penn-Co, as general contractor, was in a position of superior knowledge regarding when leaks occurred and UNI’s demands insofar as those leaks were concerned. Further, Penn-Co was named as a party to the underlying action from its outset on July 21, 2000—ESM was not brought into the litigation until the third-party petition was filed on April 20, 2001. Further, General Casualty points to the fact that Penn-Co did not provide notice of any claim to rights under ESM’s policies until Penn-Co’s June 6, 2001, tender of defense sent to ESM’s counsel. Therefore, claims General Casualty, as Penn-Co and

ESM are in unique and separate situations insofar as notice of claims by UNI, and notice to General Casualty of claims/rights under the policies, the issues previously litigated are *not* identical.

Alternatively, General Casualty resists on grounds that even if the four elements for imposition of collateral estoppel are met, neither the December 24, 2002, Order or the *General Casualty I* judgment should be given preclusive effect because doing so would be unfair to General Casualty—an additional consideration General Casualty contends should be reviewed where collateral estoppel is sought to be used offensively. General Casualty bases its claims of unfairness on two grounds: (1) the December 24, 2002, Order and *General Casualty I* judgment are inconsistent with a previous judgment—specifically, the order granting Penn-Co partial summary judgment in the underlying action; and (2) Penn-Co could have effected joinder in *General Casualty I* under Federal Rule of Civil Procedure 24, but chose not to do so. With respect to the first ground—inconsistent judgments—General Casualty argues that Penn-Co’s position here is inconsistent with the one it took in requesting the Black Hawk County Court grant summary judgment as to UNI’s negligence claim. General Casualty points specifically to this passage from Judge Clarke’s order granting Penn-Co summary judgment:

Recovery in tort “is generally available when the harm results from ‘a sudden or dangerous occurrence, frequently involving some violence or general hazard in the *nature of the product defect.*’” *American Fire & Casualty Company vs. Ford Motor Company*, 588 N.W.2D 2nd 437, 439 (Iowa 1999) (Quoting *Nelson vs. Todd’s Ltd.*, 426 N.W. 2nd 120, 125 (Iowa 1988)). The court is of the opinion that the action of the plaintiff against the defendant Penn-Co must be limited to its contract action. The losses pointed to by the plaintiffs were merely a foreseeable result from the failure of the construction to “perform” in the manner in which it was intended and is not

sufficient to take this cause of action outside the contract and into tort.

Plf.'s App. at 251. General Casualty asserts that Judge Clarke's determination is clearly at odds with Judge Jarvey's December 24, 2002, Order finding that there was an "occurrence" under the policies.

Elaborating on its position of unfairness, General Casualty argues that due to the position Penn-Co took in the underlying action which precipitated the grant of summary judgment on UNI's negligence claims, Penn-Co should be judicially estopped from arguing that the damages were caused by an "occurrence." General Casualty asserts that in the underlying action Penn-Co successfully asserted that there were no damages from any actions other than breaches of contract, which as a matter of law would not constitute an "occurrence" within the meaning of the policies. Therefore, as Penn-Co successfully restricted the underlying action to *only* breach of contract claims, it is now judicially estopped from taking a contrary position (i.e. that the damages were caused by an "occurrence" as defined in the policy') to the prejudice of General Casualty.

In resistance to General Casualty's judicial estoppel argument, Penn-Co argues against application of judicial estoppel on the grounds that the term "occurrence" in the policies is *nowhere* defined in terms of a 'tort.' Penn-Co distinguishes the authority relied upon by General Casualty—mainly the case of *Pursell Construction Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999)—by pointing out that *Pursell* only held that the undefined term 'accident' focused upon the damage to an injured party rather than the cause of the damage, and noting that unlike *Pursell*, UNI was seeking damages for resulting property damage occurring from 1998 through 2001. Penn-Co further points out that the issue of whether the property damage resulted from an "occurrence" under the policies was not even at issue in the underlying litigation, and Judge Clarke was *never*

asked to render a decision regarding insurance coverage. Additionally, Penn-Co argues that there is no support for General Casualty’s argument that the damages that occurred were ‘expected,’ and thereby not accidental, merely because of the contractual relationship between UNI, Penn-Co and ESM. Penn-Co also argues that the settlement reached with UNI encompassed compensatory damages for lost revenue resulting from the leaking roof and physical injury to UNI’s property—not just costs of repairing the roof—therefore, the damages are clearly the result of an “occurrence” under the policy. Finally, Penn-Co asserts that insofar as “occurrence” is capable of two common sense definitions, it is ambiguous—and any ambiguity must be construed against General Casualty.

In reply, General Casualty contends that Penn-Co wholly failed to properly rebut its argument for judicial estoppel. General Casualty points out that an “occurrence” is defined in the policies as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Plf.’s Reply Brief, Doc. No. 46, at 8. The term ‘accident’ is undefined by the policies, and therefore the definition accorded to the term by the Iowa Supreme Court—which defines an accident in terms of an “undesigned, sudden, and unexpected event”—must be used. Judge Clarke, in granting Penn-Co’s motion for summary judgment on the negligence claim, stated that UNI’s claims must be limited to breach of contract as the losses “were merely a foreseeable result from the failure of the construction to ‘perform’ in the manner in which it was intended. . . .” *Id.* at 9 (quoting Plf.’s App. at 251). General Casualty argues that Penn-Co cannot argue that the same event was in one instance an “undesigned, unexpected event” and then assert that the resulting damage from said event was “a foreseeable result”—therefore, judicial estoppel should preclude Penn-Co’s arguments here.

In reply, Penn-Co generally rebuts each of General Casualty’s arguments. Penn-Co

contends that defensive collateral estoppel⁵ is appropriate here as Penn-Co, a stranger to *General Casualty I*, is here attempting to prevent General Casualty from relitigating identical issues. Penn-Co argues that when General Casualty sued ESM in December 2001, General Casualty had notice of Penn-Co's impending claim, and despite that fact, negligently failed to name Penn-Co as a party to *General Casualty I*. Penn-Co claims it is merely trying to prevent General Casualty from having "two bites at the apple" in asserting defensive collateral estoppel here. Penn-Co further asserts that even if the court considered the two additional factors in the offensive collateral estoppel analysis, they both mitigate in Penn-Co's favor. Penn-Co avers that it is *not* unfair to bar General Casualty from relitigating the same issues, and further that General Casualty's *own failure* to join Penn-Co in *General Casualty I* is not a circumstance justifying relitigation of the issues in *General Casualty I*.

It is clear that the parties, in discussing preclusion, raise two separate, yet analytically intermingled, legal concepts: judicial estoppel and collateral estoppel. The court will address each of these concepts and arguments in turn, beginning first with judicial estoppel—for if judicial estoppel applies, it will prevent Penn-Co's collateral estoppel argument altogether.

⁵Though the subsection heading in Penn-Co's Reply states: "Offensive Collateral Estoppel Is Proper," the substance of Penn-Co's argument is that defensive collateral estoppel is appropriate here—therefore, the court will relay only the *substance* of Penn-Co's argument as the appropriateness of defensive collateral estoppel in this case appears to be Penn-Co's true position.

2. *Judicial estoppel*

The doctrine [of judicial estoppel] ‘prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding.’” *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166 (Iowa 2003) (quoting *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987)); see *Duder v. Shanks*, 689 N.W.2d 214, 220 (Iowa 2004) (same); *State v. Jacobs*, 607 N.W.2d 679, 687 (Iowa 2000) (same). The doctrine is a rule based on a common sense rule “designed to protect the integrity of the judicial process by preventing deliberately inconsistent - and potentially misleading - assertions from being successfully urged in succeeding tribunals.” *Wilson*, 666 N.W.2d at 166 (citing *Vennerberg Farms, Inc.*, 405 N.W.2d at 814). The doctrine only applies to cases in which the party invoking the doctrine is prejudiced by the failure to invoke the doctrine or is in privity with the allegedly inconsistent party. *Id.* (citing *Ezzone v. Hansen*, 474 N.W.2d 548, 550 (Iowa 1991)). “Another fundamental feature of the doctrine is the requirement of proof that the inconsistent position has been successfully asserted in the prior tribunal.” *Id.* (citing *State v. Jacobs*, 607 N.W.2d 679, 687 (Iowa 2000)); see *Roach v. Crouch*, 524 N.W.2d 400, 403 (Iowa 1994) (“A fundamental feature of [the judicial estoppel] doctrine, however, is the successful assertion of the inconsistent position in the earlier action.”) (citing *Graber v. Iowa Dist. Court*, 410 N.W.2d 224, 227 (Iowa 1987)). “Without such proof, ‘application of the rule is unwarranted because no risk of inconsistent, misleading results exists.’” *Wilson*, 666 N.W.2d at 166 (quoting *Vennerberg Farms, Inc.*, 405 N.W.2d at 814); see *Schettler v. Iowa Dist. Court for Carroll County*, 509 N.W.2d 459, 467 (Iowa 1993) (noting that doctrine does not apply absent judicial acceptance of inconsistent position). “In addition, application of the doctrine requires proof of an *intentional* attempt to mislead the court with the inconsistency.” *Roach*, 524 N.W.2d at 403 (emphasis added).

Most “[t]ypically, judicial estoppel arises in cases in which a party asserts a position in a prior judicial proceeding and then asserts an inconsistent position in a separate and subsequent judicial proceeding.” *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 164 n.2 (Iowa Ct. App. 1996).

In this instance, the court finds Penn-Co’s position persuasive. The issues presented to Judge Clarke were simply whether UNI could assert a tort claim against Penn-Co in light of the economic loss doctrine in Iowa. Judge Clarke specifically addressed tort claims based on an injury to a patron and damages to exterior sidewalks, streets and walking plazas—not to damage to the interior of the UNI Dome—in determining that UNI could not assert negligence claims against Penn-Co. Furthermore, the issue of whether the resulting damage was ‘property damage’ caused by an “occurrence” under the policies was not an issue before Judge Clarke. General Casualty advocates that by seeking summary judgment on UNI’s negligence claims in the underlying action, Penn-Co’s attempt here to claim that General Casualty is precluded from relitigating whether an “occurrence” as defined by the policies occurred is barred by the judicial estoppel doctrine. This is not the case. The CGL policy covers ‘property damage’ caused by an “occurrence”—which is further defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The term ‘accident’ has been designated by the Iowa Supreme Court as a term of art, if you will, when used in the context of insurance policies—and is accorded this definition:

an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation or force. . . . [G]iving to the world the meaning which a man of average understanding would, we think [“accident”] clearly implies a misfortune with concomitant damage to a victim, and not the negligence which eventually results in that misfortune.

Pursell Constr., 596 N.W.2d 67, 70 (Iowa 1999). In framing its argument, General Casualty relies heavily on the portion of the definition describing an accident as an “undesigned, sudden, and unexpected event” as showing Penn-Co’s assertion here of an “occurrence” is inconsistent with Penn-Co’s assertion in the underlying action that it was not liable in tort, as “[r]ecovery in tort is generally available when the harm results from ‘a sudden or dangerous occurrence, frequently involving some violence or general hazard of the nature of the product defect.’” February 11, 2003, Order of Judge Clarke, Plf.’s App. at 251 (citing *Am. Fire & Casualty Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439 (Iowa 1999), in turn quoting *Nelson*, 426 N.W.2d at 125). However, the court would direct a closer look at the definition of an ‘accident’—in particular the last portion, which reads that an ‘accident’ is “*not* the negligence which eventually results in [a misfortune with concomitant damage to a victim.]” *Pursell Constr.*, 596 N.W.2d at 70 (emphasis added). In this light, it appears Penn-Co is not asserting conflicting positions, but rather the *exact same* position. By definition, an ‘accident’ is *not* the negligence resulting in damage, and Penn-Co’s position in the underlying action was that UNI’s negligence claims should be dismissed—the positions seem entirely compatible in this perspective. Further, there is no evidence that Penn-Co deliberately made inconsistent and potentially misleading assertions in the underlying action and the present litigation between General Casualty and Penn-Co. *See Roach*, 524 N.W.2d at 403. And, as Penn-Co’s positions in the underlying action and in this case are consistent, there is likewise no risk of inconsistent, misleading results. *See Wilson*, 666 N.W.2d at 166. Therefore, the doctrine of judicial estoppel does not prevent Penn-Co from asserting that General Casualty is collaterally estopped from relitigating whether there was an ‘occurrence,’ as that term is defined in the policies—and General Casualty’s motion for summary judgment, to the extent it relies upon judicial

estoppel, is **denied in part**.

3. Collateral estoppel

a. Choice of law

As a general principle, a federal court sitting in diversity must apply the substantive law of the state in which the cause of action arose. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L.Ed. 1188 (1938); *Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir.2000). Furthermore, "if the state law is ambiguous, [the court must] predict how the highest court of that state would resolve the issue." *Clark*, 205 F.3d at 1082.

In the Eighth Circuit, it is clear that state law applies, at least where, as here, the prior judgment also was in a diversity case. As the Eighth Circuit Court of Appeals held in *Hillary v. Trans World Airlines*, 123 F.3d 1041 (8th Cir. 1997), *cert. denied*, 522 U.S. 1090, 118 S.Ct. 881, 139 L.Ed.2d 870 (1998):

Although the majority of circuits have held that the res judicata effect of a federal court judgment in a diversity action is a matter of federal law, "cases from this circuit have consistently concluded that [the res judicata or] collateral estoppel [effect of a prior judgment] in a diversity action is a question of substantive law controlled by state common law." *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617 (8th Cir. 1994) (quoting *Lane v. Sullivan*, 900 F.2d 1247, 1250 (8th Cir.) (citations omitted), *cert. denied*, 498 U.S. 847, 111 S. Ct. 134, 112 L. Ed. 2d 101 (1990)). "This Court has consistently looked to state law to determine the effect of the judgment of another federal court in a case where state law supplied the rule of decision. This rule applies when the original judgment is that of another federal court sitting in diversity." *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1237 (8th Cir. 1994) (citations omitted), *cert. denied*, 516 U.S. 814, 116 S.Ct. 66, 133 L.Ed.2d 28 (1995).

Hillary, 123 F.3d at 1043; *see Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1014 (8th Cir.

2002) (“it is fundamental that the [preclusive] effect of the first forum’s judgment is governed by the first forum’s law, not by the law of the second forum.”); *Larsen v. Mayo Foundation*, 21 Fed. Appx. 516, 517, 2001 WL 1267145 at **1 (8th Cir. Oct. 24, 2001) (finding state law to apply to preclusive effect accorded prior judgment issued by a federal court sitting in diversity); *Lyons v. Anderson*, 123 F. Supp. 2d 485, 491 (N.D. Iowa 2000) (citing *Hillary*, and ultimately applying state law to determine preclusive effect of relevant prior judgment by federal court sitting in diversity). Accordingly, the court will decide this issue applying Iowa law.

b. Applicable principles of issue preclusion

Collateral estoppel, or issue preclusion, is a doctrine that bars relitigation of an issue identical to the issue actually litigated in the previous action. *Popp Telcom v. Am. Sharecom, Inc.*, 210 F.3d 928, 939 (8th Cir. 2000); *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir. 1990), *cert. denied*, 498 U.S. 823, 111 S. Ct. 74, 112 L. Ed. 2d 48 (1990); *Fischer v. City of Sioux City*, 654 N.W.2d 544, 546 (Iowa 2002). The doctrine prevents the relitigation of a particular issue, even without mutuality of parties, if (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment. *Fischer*, 654 N.W.2d at 547 (citing *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)); *United Fire & Casualty Company v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 655 (Iowa 2002)) *Harrison v. State Bank of Bussey*, 440 N.W.2d 398, 401 (Iowa Ct. App. 1989) (same); *Clark v. Glanton*, 370 N.W.2d 606, 608 (Iowa Ct. App. 1985). The Iowa Supreme Court has recognized the doctrine of issue preclusion may be used offensively or defensively:

As we have noted in prior cases, the doctrine may be utilized

in either a defensive or an offensive manner. The phrase “defensive use” of the doctrine of collateral estoppel is used here to mean that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense. On the other hand, the phrase “offensive use” or “affirmative use” of the doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim. In other words, defensively a judgment is used as a “shield” and offensively as a “sword.”

Fischer, 654 N.W.2d at 546-47 (quoting *Hunter*, 300 N.W.2d at 123 (internal citations omitted)). “Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely ‘switching adversaries.’ Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible.” *Id.* at 547 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-30 (1979) (internal citation and quotation marks omitted)). As the Iowa Supreme Court has noted, defensive use of the doctrine of issue preclusion promotes judicial economy. *Id.* (quoting *Parklane Hosiery Co.*, 439 U.S. at 329). If the doctrine of issue preclusion is offensively invoked, the court must also determine (1) whether the opposing party was afforded a full and fair opportunity to litigate the relevant issues leading to liability in the previous action, and (2) whether any other circumstances are present that would justify granting the resisting party the opportunity to relitigate the issues. *Id.*

With these principles in mind, the court turns to a discussion of each of the issues that Penn-Co argues General Casualty is precluded from relitigating: (1) whether there was “property damage” resulting from an “occurrence”; and (2) whether Penn-Co complied with the notice requirement in the policies, and if not, whether there was prejudice to General Casualty as a result of that failure. The court will examine each of these issues

in turn.

c. “Property damage” resulting from an “occurrence”

All of the policies provide coverage for “property damage” resulting from an “occurrence”—whether an “occurrence” resulting in “property damage” took place was an issue that was raised and litigated in the declaratory judgment action between General Casualty and ESM. In fact, General Casualty raised this precise issue in its complaint for declaratory judgment in *General Casualty I*. The court finds the issue was material and relevant to the disposition of the prior action because the question of whether there was an “occurrence” and resulting “property damage” was a central focus of the action. Specifically, General Casualty, by filing the declaratory judgment action, sought a judicial determination that damage to the interior of the UNI Dome was not covered by the policies as the property damage did not result from an “occurrence” as defined in the policies. Further, the December 24, 2002, Order’s determination that there was an “occurrence” resulting in “property damage” was necessary and essential to the judgment ESM obtained against General Casualty—specifically, that General Casualty had a duty to defend and indemnify ESM in the underlying action. Judgment could not have entered in favor of ESM absent a determination that “property damage” due to an “occurrence” had transpired. If the December 24, 2002, Order, had found that there was no “occurrence” as defined by the policy, then General Casualty would have been under no duty to defend and indemnify ESM. Therefore, the December 24, 2002, Order, in its entirety, revolves around a determination of whether the “property damage” due to an “occurrence” had taken place as defined by the policies—and such a ruling was necessary and essential to the judgment ESM obtained against General Casualty in that action.

As Penn-Co, in this instance, seeks to wield the collateral estoppel ‘sword’ against General Casualty, the court must evaluate two additional considerations: (1) whether the

opposing party in the earlier action was afforded a full and fair opportunity to litigate the issue of whether “property damage” resulting from an “occurrence” had occurred under policies; and (2) whether any other circumstances are present that would justify granting the party resisting issue preclusion occasion to relitigate the issues. *Fischer*, 654 N.W.2d at 547 (citing *Hunter*, 300 N.W.2d at 123). As to the first consideration, it is obvious from the record that General Casualty had ample opportunity to fully and completely litigate the issue of whether “property damage” resulting from an “occurrence,” as defined by the policies, had transpired in *General Casualty I*. With regard to the second consideration, General Casualty lodged two arguments: (1) it would be unfair to prevent it from relitigating this issue because the December 24, 2002, Order is inconsistent with Judge Clarke’s ruling; and (2) Penn-Co could have joined as a party to *General Casualty I* pursuant to Federal Rule of Civil Procedure 24. For the same reasons this court previously found Penn-Co had not asserted inconsistent positions in this action and the underlying action, Judge Clarke’s order and the December 24, 2002, Order are not inconsistent. Therefore, the only remaining bar to according the December 24, 2002, Order issue preclusive effect is General Casualty’s argument that Penn-Co could have joined *General Casualty I*. However, equally as plausible is the fact that General Casualty could have named Penn-Co as an additional defendant in *General Casualty I*—especially in light of the fact that discovery in *General Casualty I* most certainly produced the subcontracting agreement between Penn-Co and ESM, in which ESM was to add Penn-Co as an insured to certain policies, and maintain those policies in certain limits. This is not a circumstance justifying granting General Casualty the opportunity to relitigate the issue. In this instance General Casualty is attempting to relitigate an identical issue by merely switching adversaries—exactly what offensive issue preclusion was intended to prevent. In sum, the court finds General Casualty is precluded from relitigating the issue of whether

“property damage” was caused by an “occurrence.”⁶ Likewise, Penn-Co’s motion for summary judgment, to the extent that it claimed principles of collateral estoppel prevented General Casualty from relitigating the issue of whether the underlying action involved “property damage” resulting from an “occurrence,” is **granted in part**.

d. Notice

i. Notice provisions. The policies in question (1998-1999, 1999-2000 & 2000-2001 Umbrella Policies and the 2000-2001 Contractor’s Policy) contain the following notice provisions:

- a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the “occurrence” or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.
 - b. If a claim is made or “suit” is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or “suit” and the date received; and
 - (2) Notify us as soon as practicable.
- You must see to it that we receive written notice of the claim or “suit” as soon as practicable.

Plf.’s App. at 38 (1998-1999 Umbrella Policy); Def’t.’s Supp. App. at 234 (2000-2001 Umbrella Policy); Def’t.’s Supp. App. at 149 (2000-2001 Contractor’s Policy).

⁶ This ruling is not intended to preclude General Casualty from litigating the related issue of whether Penn-Co is entitled to coverage where “property damage” results from an “occurrence.”

The preamble of the 1998-1999 Umbrella Policy provides the following guidance in determining what “you” refers to throughout that policy:

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words “we”, “us” and “our” refer to the company providing this insurance.

The word “insured” means any person or organization qualifying as such under **WHO IS AN INSURED (SECTION III)**.

Plf.’s App. at 32; Def’t.’s Supp. App. at 75. The 1999-2000 and 2000-2001 Umbrella Policies contain the same language. With regard to that same inquiry, the 2000-2001 Contractor’s Policy provides the following: “Throughout this policy the words ‘you’ and ‘your’ refer to the Named Insured shown in the Declarations.” Def’t.’s Supp. App. at 115.

ii. Arguments of the parties. In its motion for summary judgment General Casualty argues that it is entitled to judgment as a matter of law as Penn-Co failed to substantially comply with the notice requirements of the policies. General Casualty further advocates that the notice requirements in the policies are conditions precedent for coverage—therefore, it is the insured’s burden to demonstrate compliance with the notice requirements as a prerequisite to coverage. General Casualty avers that Penn-Co delayed notice by anywhere from ten to thirty months based on facts in the record. General Casualty points out that leaks in November 1998 continuing through spring 1999 triggered Penn-Co’s notice obligations under the policy. Yet, Penn-Co waited until June 6, 2001, to tender notice of its claim for coverage and defense—nearly 30 months after the first leaks occurred in November 1998. General Casualty further avers that the notice provisions require prompt notice of any suit or claim, and that the following claims were

made against Penn-Co on several occasions triggering the notice provisions: (1) Alan Stevens Report in July 1999; (2) October 8, 1999, letter from Penn-Co to UNI that an Alan Stevens's consultant informed an ESM foreman that he didn't think UNI would ever accept the roof; (3) Penn-Co's notification to Merchants on November 3, 1999, of a claim on ESM's bond; (4) November 12, 1999, letter from ESM to Penn-Co and UNI expressing ESM's concern about receiving payment and about UNI accepting the roof; (5) November 29, 1999, letter from UNI to Penn-Co stating that UNI considered recent repairs temporary and that a long-term solution was required; (6) the mediation between UNI and Penn-Co in December 1999. General Casualty contends that in the absence of satisfactory rebuttal evidence produced by Penn-Co, the court must presume General Casualty was prejudiced by Penn-Co's failure to abide by the notice requirements. General Casualty contends it was, in fact, prejudiced by Penn-Co's failure to notify in that General Casualty did not have an opportunity to "review the scene of the claim prior to remediation, obtain its own expert in anticipation of litigation, or obtain its own counsel in anticipation of litigation." Plf.'s Brief, Doc. No. 31, at 40.

In resistance, Penn-Co contends that the issue of whether General Casualty had notice of the UNI claims and/or suffered prejudice as a result of any delay in notice, was already determined in *General Casualty I*. Penn-Co claims that the policies only require "you" (defined as the Named Insured) to provide notice "as soon as practicable or promptly." There is *no similar requirement* that an additional insured provide additional notice with respect to claims against it as an additional insured. Penn-Co relies on *General Casualty I*—in which Judge Jarvey, after holding a trial, found that General Casualty had not suffered any prejudice as a result of ESM's delay in notification—as conclusively establishing that the notice requirements were met. Further, Penn-Co asserts that General Casualty is unable to show that it was prejudiced in any way by Penn-Co's alleged failure

to comply with the notice requirements—and that the court should not rely on General Casualty’s argument that had it known it might have “done something.” Penn-Co contends that once General Casualty had notice by ESM of the third-party claims against it in the underlying action, General Casualty was on notice that other entities that fell under the “Who Is An Insured” language in its policies likewise could have claims against them. Penn-Co also asserts that the Eighth Circuit recently determined that a notice provision in an insurance policy is actually an exclusion rather than a condition precedent. Finally, Penn-Co claims as the record demonstrates that even when General Casualty received notice of the claims, it did *nothing* in response, General Casualty cannot now claim that it was prejudiced by any delay in notice.

iii. Analysis. The threshold question that must be answered is whether, as Judge Jarvey found in his December 24, 2002, Order, the notice provisions of the policies requiring notice “as soon as practicable” made the notice requirement a condition precedent to recovery. *General Casualty I*, 2002 WL 32172280 at * 11. In its resistance, Penn-Co claims that the Eighth Circuit, in *Terra Industries, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA*, 383 F.3d 754 (8th Cir. 2004), held that under Iowa law such notice provisions are *not* conditions precedent but rather exclusions—thereby placing the burden on General Casualty to prove Penn-Co’s noncompliance with the notice requirements. This court disagrees with Penn-Co’s reading of *Terra*. In *Terra*, an endorsement applied only to occurrences “happening on or between the dates January 1, 1985 and July 1, 1997 . . . which had not been reported to the insured or any of the Insured’s Insurance Carriers on or between the dates of January 1, 1985 and July 1, 1997.” *Id.* at 758 (quotations omitted). The Eighth Circuit noted the distinctions between conditions precedent and exclusions, recognizing that the insured bears the burden of proving a condition precedent, while the insurer has the burden of proving the applicability

of an exclusion. *Id.* at 759. The Eighth Circuit also noted:

Conditions precedent frequently involve something that the insured must do while exclusions involve something that the insured must not do. *See, e.g., Sager v. Farm Bureau Mut. Ins. Co.*, 680 N.W.2d 8, 9-10 (Iowa 2004); [*Grinnell Mut. Reinsurance Co. v.] Jungling*, 654 N.W.2d [530,] 541-42 [(Iowa 2002)]; *Estate of Tedrow v. Standard Life Ins. Co.*, 558 N.W.2d 195, 197 (Iowa 1997). This difference provides a rationale for shifting the burden of proof from the insured to the insurer for exclusions: While the insured should be required to prove that he or she took some affirmative action upon which insurance was conditional, the insurer should bear the burden to prove that the insured took a prohibited action.

Id. at 760. Examining the provision at issue, the Eighth Circuit recognized that deeming the provision in dispute a condition precedent would require the defendant-insured to prove the negative: that its insurance carriers did not know about an occurrence. Such an interpretation would not conform with the policy underlying the shifting of burdens between insured and insurer based on whether the provision was a condition precedent or an exclusion. *Id.* Ultimately, the Eighth Circuit determined that the provision at issue should be viewed as an exclusion that the insurer-plaintiff had the burden to prove. *Id.* This case is clearly distinguishable from *Terra*. Here, the policies contain the traditional “as soon as practicable” language found in notice provisions that are conditions precedent to recovery—as noted by Judge Jarvey. Further, placing the burden on Penn-Co to show it has met the notice requirements requires Penn-Co to prove something in the affirmative, not the negative. Finally, the *Terra* decision itself gives an example of a situation closely mirroring the one at hand as demonstrating a condition precedent: “For example, many liability insurance policies require that the insured notify the insurer of any claim immediately or *as soon as practicable* as a condition precedent to recovery.” *Id.* at 759

(citing *Henschel v. Hawkeye-Security Ins. Co.*, 178 N.W.2d 409, 412, 420 (Iowa 1970)). This court, like Judge Jarvey, finds that the notice provisions of the policy are conditions precedent to Penn-Co's recovery.

The court turns next to Penn-Co's argument that "you," as used in the notice provisions only required notice from ESM, and that once ESM notified General Casualty of the claim against it, Penn-Co was not additionally required to notify General Casualty—Penn-Co goes so far as to argue that based on Judge Jarvey's finding that General Casualty was not prejudiced by ESM's delay in notice, that General Casualty was also not prejudiced by any delay in Penn-Co's notice. Essentially, Penn-Co seems to argue that due to the "you" language in the policies, it essentially stepped into the shoes of ESM insofar as compliance with the notice provisions is concerned—as if Penn-Co can 'piggy-back' ESM's notice to General Casualty. The 1998-1999, 1999-2000 and 2000-2001 Umbrella Policies clearly state that "you" refers to *both* the Named Insured in the Declarations *and* any person or organization qualifying as a Named Insured under the policy. Clearly, in terms of the notice provisions in the Umbrella Policies, the definition of "you" requires both ESM *and* Penn-Co to comply. The 2000-2001 Contractor's Policy states that "you" refers to "the Named Insured shown in the declarations." Deft.'s Supp. App. at 115. However, the notice provision of the 2000-2001 Contractor's Policy has an additional subsection (c) which states:

c. You *and any other involved insured* must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation, or settlement of the claim or defense against the

- “suit”;
- (4) Assist us, upon our request in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.
 - (5) Promptly tender the defense of any claim made or “suit” to any other insurer which also has available insurance for an “occurrence” or offense which we cover under Contractors Liability coverage.

Deft.’s Supp. App. at 149. The 2000-2001 Contractor’s Policy also includes the following language under a subsection entitled “Separation of Insureds”:

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or “suit” is brought.

Id. at 150. Applying the policy language “[s]eparately to each insured against whom claim is made or suit is brought,” and considering the language in the notice provision requiring prompt action on the part of any other insured, the court finds that the notice provision of the 2000-2001 Contractor’s Policy applies separately to ESM and Penn-Co—such that Penn-Co cannot piggyback ESM’s notice.

The court turns next to Penn-Co’s argument that Judge Jarvey’s finding that ESM substantially complied with the notice provision and that General Casualty was *not* prejudiced from any delay in notification, precludes litigation as to whether Penn-Co provided the requisite notice. Under Iowa law

[w]hen a notice provision is written as a condition precedent to policy coverage in an insurance contract, substantial

compliance with such a condition must be shown by the claimant. *Bruns v. Hartford Accident & Indem. Co.*, 407 N.W.2d 576, 579 (Iowa 1987) (citing *Henderson v. Hawkeye-Sec. Ins. Co.*, 252 Iowa 97, 103-07, 106 N.W.2d 86, 89-92 (1960)). Absent the claimant proving substantial compliance, in order to maintain the action against the insurer the claimant must show that failure to comply was excused, or that the requirements of the condition were waived, or that failure to comply was not prejudicial to the insurer. *Bruns*, 407 N.W.2d at 579 (citing *Henderson*, 252 Iowa at 107, 106 N.W.2d at 92).

Unless the claimant meets this burden of showing substantial compliance, or excuse from compliance, or waiver of requirement, or lack of prejudice to the insurer, prejudice to the insurer must be presumed. *American Guar. & Liab. Ins. Co. v. Chandler Mfg. Co.*, 467 N.W.2d 226, 228 (Iowa 1991); *Bruns*, 407 N.W.2d at 579 (citing *Henderson*, 252 Iowa at 106-07, 106 N.W.2d at 92); *Henschel v. Hawkeye-Sec. Ins. Co.*, 178 N.W.2d 409, 415 (Iowa 1970). Although this presumption of prejudice is rebuttable, unless it is overcome by a satisfactory showing of lack of prejudice, it will defeat the insured's recovery. *Henschel*, 178 N.W.2d at 415; *Henderson*, 252 Iowa at 107, 106 N.W.2d at 92.

Met-Coil Sys. Corp. v. Columbia Cas. Co., 524 N.W.2d 650, 653 (Iowa 1994); see *American Family Mut. Ins. Co. v. Peterson*, 679 N.W.2d 571, (Iowa 2004) (noting that “an insured must show substantial compliance with [conditions precedent]”) (citation and quotation omitted); *Simpson v. U.S Fidelity & Guar. Co.*, 562 N.W.2d 627, 631-32 (Iowa 1997) (citing *Met-Coil* for the same principles). However, “where the facts are not in dispute, and the inferences are certain, [the question of whether timely notice was given] is a question of law for the court.” *Met-Coil*, 524 N.W.2d at 656 (quoting *Estate of Linderholm v. State Auto. & Cas. Underwriters*, 169 N.W.2d 561, 564 (Iowa 1969)). Having already found that Penn-Co does not stand in the footsteps of ESM under the

language of the policies, the court likewise concludes that the reasonableness of notice and/or the prejudice of delayed notice by ESM raised and litigated in *General Casualty I*, is *not* the same issue as whether Penn-Co's notice complied with the notice requirements, was reasonable or caused General Casualty prejudice. There are some key differences in the factual situations of ESM and Penn-Co. Specifically, Penn-Co, as the general contractor of the Project, was aware of the roof leaks and UNI's claims and demands with respect to those roof leaks, in advance of ESM receiving notice of such leaks and claims. Penn-Co also had knowledge of facts pursuant to which it made a claim on ESM's bond. Penn-Co was named as a defendant in the underlying action, which was filed on July 21, 2000; ESM was not involved in the underlying action until Penn-Co filed a third-party complaint against ESM on April 20, 2001—nine months later. The court finds persuasive General Casualty's arguments that the factual differences between Penn-Co's and ESM's situations prevent issue preclusion as to whether the requisite notice was given in this case. Therefore, the court rules General Casualty is not collaterally estopped from litigating the issue of whether it received adequate notice or was prejudiced by Penn-Co's alleged failure to timely notify it of an occurrence which may result in a claim, or of a claim or suit brought against the insured, a condition precedent to coverage. Further, the court finds that genuine issues of material fact as to whether Penn-Co substantially complied with the notice requirements and whether any delay in notice was prejudicial prevent entry of summary judgment for either Penn-Co or General Casualty on this issue. The ultimate disposition of the pending motions on this issue is that Penn-Co's motion for summary judgment is **denied in part** as to General Casualty being collaterally estopped from litigating notice; General Casualty's motion for summary judgment claiming no genuine issue of material fact that Penn-Co did not comply with the notice requirements and that Penn-Co's delayed notice was prejudicial to Penn-Co, is also **denied in part**.

H. The Penn-Co/ESM Stipulated Settlement

1. Arguments of the parties

Penn-Co, in its motion for summary judgment, asserts that due to General Casualty's failure to provide the defense and indemnification that Penn-Co and ESM were entitled to under the policies, ESM was forced to enter into a settlement agreement with Penn-Co pursuant to *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) and *Red Giant Oil Company v. Lawlor*, 528 N.W.2d 524 (Iowa 1995). According to Penn-Co, ESM recognized the substantial likelihood that it would be found liable to Penn-Co for the third party claims, and decided to enter into a settlement of those claims to protect itself from liability—a course of action advocated by *Red Giant*. Penn-Co claims the settlement amount, \$1,655,322.50, included defense expenses and indemnification costs incurred by Penn-Co as a consequence of ESM's breach of its defense and indemnification obligations under the subcontract, as well as General Casualty's breach of its obligations to Penn-Co as an additional insured. After discussing the rationale behind the holding of the *Red Giant* decision, Penn-Co claims that the Stipulated Settlement is "inviolable and is conclusive against the carrier whose conduct caused the settlement agreement to come into being." Deft.'s Brief, Doc. No. 26, at 17. Penn-Co further contends that the record contains no genuine issue of material fact as to the validity or reasonableness of the settlement, and that Penn-Co is therefore entitled to immediate entry of judgment against General Casualty in the amount of \$1,655,322.50 plus the costs incurred by Penn-Co in the current litigation.

In resistance, General Casualty asserts that even if Penn-Co was entitled to coverage under the policies, it is *not* entitled to summary judgment in the amount reached in the Stipulated Settlement. General Casualty first looks to the *Shugart* and *Red Giant* decisions, and notes that both require the injured party to prove that the underlying claim is covered by the policy and that the settlement is reasonable and prudent. Further, both cases allow

the insurer to challenge the settlement on the basis of fraud and collusion. General Casualty also notes that *Red Giant* establishes that issues of fraud/collusion and reasonableness/prudence are *fact* questions not susceptible to disposal on summary judgment. In attacking Penn-Co's motion for summary judgment, General Casualty first contends that the Stipulated Settlement was not reasonable or prudent for a number of reasons: (1) it was reached *after* the December 24, 2002, Order, was published in which Judge Jarvey indicated that the policies did *not* cover damage to the roof itself; (2) the Stipulated Settlement was an attempt to get around this finding in the December 24, 2002, Order, as it allocates the entire amount of the settlement to covered damages under the policies; (3) the UNI/Penn-Co settlement for \$1.4 million concludes that ESM's share of covered losses was \$700,000—which is inconsistent with the Stipulated Settlement's finding that Penn-Co's liability and exposure was \$1,655,322.50. Second, General Casualty asserts that as neither the Stipulated Settlement between Penn-Co and ESM, or the settlement agreement between Penn-Co and UNI, apportioned the settlement amounts into covered and non-covered losses under the policies, the agreements are unreasonable and unenforceable against General Casualty. General Casualty contends that this failure to allocate is particularly telling in that Minnesota law, which Penn-Co and ESM expressly stated would govern the Stipulated Settlement, requires allocation. General Casualty also asserts that as a matter of law an unreasonable Stipulated Settlement is proof of collusion—and that the execution and timing of the Loan Receipt Agreement between Penn-Co and St. Paul emphasizes the collusive nature of the Stipulated Settlement. Specifically, that the Loan Receipt Agreement was reached just months before both the settlement agreement with UNI, of which ESM was to contribute \$700,000, and the Stipulated Settlement with ESM, for \$1.655 million, were executed. General Casualty contends that this attempt to shift the risk from a primary insurance carrier (St. Paul) to

a possible excess insurance carrier (General Casualty) runs afoul of the purpose of *Shugart* and should not be sanctioned. In conclusion, General Casualty urges the court to deny Penn-Co's motion for summary judgment, and asks that the court grant summary judgment to General Casualty on grounds that the Stipulated Settlement is collusive as a matter of law, is null and void and cannot be used to any amounts from General Casualty.

In reply, Penn-Co points out that General Casualty's wrongful refusal to defend ESM and Penn-Co resulted in Penn-Co's and ESM's exposure to significant defense expenses and potential liability—which Penn-Co and ESM limited by entering into the Stipulated Settlement, a course of action expressly approved by *Red Giant*. According to Penn-Co, General Casualty's wrongful refusal to defend Penn-Co gives a presumptive effect to the insured's liability and amount of damages as delineated in the Stipulated Settlement, and that the insurer bears the burden of rebutting this presumption, while the insured bears the burden of showing the settlement is reasonable and prudent. Penn-Co asserts that General Casualty's conclusory assertions that the Stipulated Settlement is unreasonable and the result of collusion, which are not backed by the record, are not enough to rebut the presumption raised. In summary, Penn-Co asserts that the Stipulated Settlement is a valid judgment, and that General Casualty is required, due to its failure to accept its insured's tender of defense, to reimburse Penn-Co according to the Stipulated Settlement.

General Casualty responds, contending that even if the court concludes that Penn-Co is entitled to coverage under the policies, General Casualty should be allowed to challenge the reasonableness of the settlement agreement and whether the agreement is the product of fraud or collusion. General Casualty contends that as of the date of the Stipulated Settlement, the only remaining "covered" or "consequential" damages in the underlying action amounted to UNI's claim for \$272,549.00 in lost revenue—*far* less than the \$1.65

million Stipulated Settlement, or the \$1.4 million settlement agreement reached in the underlying action. General Casualty also again points out that the Stipulated Settlement purporting to allocate the entire amount to “covered” losses for damage resulting *from* the roof leaks was entered *after* the December 24, 2002, Order in which Judge Jarvey held that only “consequential damages” not actual damage to the roof itself, were covered. General Casualty submits that at the *very least* the court should find genuine issues of material fact as to the issues of the enforceability of the Stipulated Settlement, the reasonableness/prudence of the Stipulated Settlement, and whether the Stipulated Settlement was fraudulent or collusive in nature, which would prevent entry of summary judgment in Penn-Co’s favor.

2. *What law applies?*

As a preliminary matter, in light of the choice-of-law clause in the Stipulated Settlement indicating that Minnesota law would apply, the parties banter back and forth as to which state’s law (Minnesota or Iowa) applies in determining the validity and effect of the Stipulated Settlement. The choice-of-law provision states:

Construction. This instrument shall be governed by and construed under Minnesota law. In reaching this agreement, ESM and Penn Co have kept in mind and have been guided by, and have intended to invoke their rights under the decision of the Minnesota Supreme Court in *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

Deft.’s Supp. App. at 250-51. In a diversity case, the Court applies the substantive law and choice-of-law rules of the forum state—so, in this matter Iowa’s choice-of-law rules govern. *Baxter Int’l, Inc. v. Morris*, 976 F.2d 1189, 1195 (8th Cir. 1995); *Harlan Feeders, Inc. v. Grand Labs., Inc.*, 881 F. Supp. 1400, 1403-04 (N.D. Iowa 1995) (citing *Klaxon Co.*, 313 U.S. at 496). Iowa courts have adopted the “most significant relationship

test” of § 188 of the Restatement (Second) of Conflicts of Laws (“Restatement”) for determination of conflict of law questions pertaining to contract actions. *See Smith v. Gould, Inc.*, 918 F.2d 1361, 1363 n.3 (8th Cir. 1990) (citing *Cole v. State Auto & Cas. Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980)). “Settlement agreements are essentially contracts, and general principles of contract law apply to their creation and interpretation.” *Sierra Club v. Wayne Weber L.L.C.*, 689 N.W.2d 696, 702 (Iowa 2004) (citing *City of Dubuque v. Iowa Trust*, 587 N.W.2d 216, 221 (Iowa 1998) and *Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 58 (Iowa 1992)). Following § 187 of the Restatement, Iowa courts will give effect to a contractual choice of law provision provided that “it does not override the public policy of a state having a materially greater interest in the transaction” as *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1253 (N.D. Iowa 1995); *Joseph J. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 326 (Iowa 1977). Where the “law of the state chosen by the parties to govern their contractual rights and duties . . . could [*not*] have been resolved by an explicit provision in their agreement directed to that issue” under section 187(1), section 187(2) provides the following three-step process to determine whether the parties’ contractual choice-of-law provision should be honored:

First, the court must determine which state’s law would apply in default under section 188 in the absence of an effective choice of law by the parties. Second, the court must decide whether the default state has a materially greater interest in the outcome of the particular issue than the chosen state. Finally, the court must determine whether application of the law of the chosen state would be contrary to a fundamental policy of the default state.

Curtis 1000, 878 F. Supp. at 1253 (quoting *Baxter Int’l Inc. v. Morris*, 976 F.2d 1189, 1196 (8th Cir. 1992)). Looking to these factors, the court recognizes both that (1) Iowa law would be applied under section 188 as the state with the “most significant relationship,”

and, (2) that Iowa has a great interest in this dispute seeing as the litigation revolves around Penn-Co's award by UNI of the contract to replace the UNI-Dome, and how performance by Penn-Co, and all of its subcontractors including ESM, was to take place in Iowa. Further, the Stipulated Settlement involved subcontractor ESM, an Iowa entity. However, the court cannot say that Minnesota has *no* interest in the Stipulated Settlement as Penn-Co's principal place of business is in Minnesota. The Stipulated Settlement expressly, by the agreement of both Penn-Co and ESM, was premised on the Minnesota case of *Miller v. Shugart*. Moreover, this suit does not involve any Iowa residents, as the other party to *this* suit, General Casualty, is a Wisconsin corporation with its principal place of business in Wisconsin. Application of Minnesota law would also not be contrary to any fundamental public policy of Iowa—especially since Iowa law in this arena is similar to Minnesota law, and in some respects, identical. *See Red Giant Oil*, 528 N.W.2d at 534-35. In light of the analysis of these factors, the court will therefore give effect to the choice-of-law provision in the Stipulated Settlement and apply Minnesota law to the issues surrounding the Stipulated Settlement.

3. *Miller-Shugart settlements in general*

“The *Miller-Shugart* doctrine was fashioned to protect an insured who has been left to [their] own defenses because the insurer refuses to defend against the plaintiff's liability claim. The insured may escape this costly dilemma if the plaintiff is willing to undertake the burden and risk of collecting the *Miller-Shugart* settlement from the insurer.” *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 529 (8th Cir. 1996). “Under a *Miller-Shugart* settlement, the defendant settles a claim with the plaintiff for a stipulated sum, but conditions the settlement on the plaintiff's seeking recovery solely from the defendant's insurer if coverage is established.” *Jorgensen v. Knutson*, 662 N.W.2d 893, 904 (Minn. 2003); *Peterson v. Wilson Tp.*, 672 N.W.2d 556, 558 n.3 (Minn. 2003) (“In a *Miller-*

Shugart settlement, the insurer has denied all coverage, and the abandoned insured, left on its own, agrees with the plaintiffs that judgment may be entered against it in return for the plaintiffs releasing the insured from any personal liability.”) (citing *Buysse v. Baumann-Furrie & Co.*, 481 N.W.2d 27, 29 (Minn. 1992)). “In that way, the insured can avoid any personal financial liability for the claim and the plaintiff may contest the insurer’s denial of coverage through a garnishment action” against the defendant’s insurer. *Hartfiel v. McLennan*, 430 N.W.2d 215, 219 (Minn. Ct. App. 1988). Under *Miller v. Shugart*, “in the absence of fraud or collusion, a money judgment confessed to by an insured is binding on the insurer in a garnishment action if the settlement is reasonable and prudent.” *Chalmers v. Kanawyer*, 544 N.W.2d 795, 796 n.1 (Minn. Ct. App. 1996) (citing *Shugart*, 316 N.W.2d at 734-35); see *North Star Mut. Ins. Co. v. Midwest Family Mut. Ins. Co.*, 634 N.W.2d 216, 221 (Minn. Ct. App. 2001) (“The insurer is bound by the settlement only if it was reasonable and prudent and was not obtained by fraud or collusion.”); *Burbach v. Armstrong Rigging and Erecting, Inc.*, 560 N.W.2d 107, 109 (Minn. Ct. App. 1997) (“A *Miller-Shugart* settlement that is reasonable and that is not the product of fraud or collusion is enforceable against an insurer who receives notice of the settlement.”).

For an insurer to be bound by a *Miller-Shugart* agreement, the following must be established: (1) the insured is covered by the liability insurer for the damages sought; (2) the agreement is not the product of fraud or collusion; and (3) the agreement is reasonable and prudent. See *Vetter v. Subotnik*, 844 F. Supp. 1352, 1354-55 (D. Minn. 1992) (noting that “[a] *Miller-Shugart*, agreement is enforceable against an insurer if (1) the agreement is reasonable and prudent; (2) the insured did not violate his or her duty to cooperate with the insurer; and (3) the agreement is not the product of fraud or collusion” and also “the Court must also find coverage for the damages sought.”); see also *Reko v. Creative*

Promotions, Inc., 70 F. Supp. 2d 998, 1001 (D. Minn. 1999) (“In the context of a *Miller-Shugart* agreement, the judgment creditor must show probable cause that the liability insurer may be obligated to indemnify the judgment debtor for all or part of the *Miller-Shugart* judgment, the absence of fraud or collusion in the *Miller-Shugart* agreement, and that the agreement was reasonable.”) (citing *Koehnen*, 89 F.3d at 529). It is the duty of the judgment creditor to establish coverage, that the settlement is reasonable and prudent, and that the settlement is not the result of fraud or collusion. *Koehnen*, 89 F.3d at 529. If there is no coverage underlying the *Miller-Shugart* agreement, then there is no recovery against the insurer. *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990). If coverage is established, and the *Miller-Shugart* agreement is found to be unreasonable, the underlying issue is submitted for a trial on the merits, and the agreement is *not* binding on the insurer. *Id.* at 279-80.

The burden of proof is on the claimant to show that the settlement is reasonable and prudent.” *Jorgensen*, 662 N.W.2d at 904 (“In seeking to recover from the insurer, however, the plaintiff has the burden of proving that the settlement was ‘reasonable.’”). *Miller v. Shugart* defined the test for reasonableness as “what a reasonably prudent person in the position of the defendant would have settled for on the merits of plaintiff’s claim[,]” and we required consideration of any facts that bear on the issues of liability, damages, and the risks of trial.” *Jorgenson v. Knutson*, 662 N.W.2d 893, 904 (Minn. 2003) (quoting *Shugart*, 316 N.W.2d at 735). Such factors bearing on reasonableness of the settlement include: what a jury could award; undisputed injury; the risks of trial; expert testimony for both parties on issues of the likely size of a jury award; the extent of damages and liability; and the judge’s own personal experience with jury awards in similar cases. *Id.* at 904. Though reasonableness is a question of fact, it is an issue of fact to be decided by the court. This is because

[t]he ultimate issue to be decided is the reasonableness of a settlement which avoids a trial. Reasonableness, therefore, is not determined by conducting the very trial obviated by the settlement. Consequently, the decisionmaker receives not only the customary evidence on liability and damages but also other evidence, such as expert opinion of trial lawyers evaluating the “customary” evidence. This “other evidence” may include verdicts in comparable cases, the likelihood of favorable or unfavorable rulings on legal defenses and evidence issues if the tort action had been tried, and other factors of forensic significance. The evaluation of this kind of proof is best understood and weighed by a trial judge.

Alton M. Johnson Co., 463 N.W.2d at 279.

On a motion for summary judgment, it is the trial court’s duty to determine under the guidelines of *Miller* that the judgment had indicia of reliability which support a finding that the settlement is reasonable and prudent, and thus enforceable against the insurer. See *Traver v. Farm Bureau Mut. Ins. Co.*, 418 N.W.2d 727, 732 (Minn. Ct. App. 1988), *pet. for rev. denied* (Minn. Apr. 15, 1988).

Hartfiel, 430 N.W.2d at 219.

“Collusion, for purposes of a *Miller-Shugart* settlement, is a lack of opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining.” *Independent Sch. Dist. No. 197 v. Accident and Cas. Ins. of Winterthur*, 525 N.W.2d 600, 607 (Minn. Ct. App. 1995). In *Koehnen v. Herald Fire Insurance Company*, 89 F.3d 525 (8th Cir. 1996), the Eighth Circuit Court of Appeals recognized an atypical *Miller-Shugart* settlement which it held was collusive as a matter of law. This atypicality arose where although the liability insurer denied coverage, the settling insured was defended by another insurance company—“thereby shift[ing] the entire risk that [the insured] might be liable to the insurer that denied it was even obligated to

defend.” *Id.* at 529. The Eighth Circuit held the *Miller-Shugart* settlement to be collusive as a matter of law in this instance as the settling insured “was adequately defended and therefore did not require the protections of the *Miller-Shugart* doctrine” and as the posture of the *Miller-Shugart* settlement “deprived the insurer of its right to participate in the settlement process.” *Id.* at 530.

“An insurer can protect itself by bringing a declaratory judgment action on the coverage issue, challenging the settlement as fraudulent or collusive, and challenging the settlement as unreasonable or imprudent.” *Hartfiel*, 430 N.W.2d at 221 (Wozniak, C.J. concurring specially and dissenting).

4. Analysis

It appears as though both parties in their analysis of the issues at hand, have managed to comingle independent legal concepts and misapply pertinent case law. First, the posture of the Stipulated Settlement does not make it collusive as a matter of law under *Koehnen*, as advocated by General Casualty. General Casualty argues that as St. Paul accepted Penn-Co’s tender of defense, and was procuring a defense for Penn-Co at the time the Stipulated Settlement was reached, that Penn-Co is therefore in the same position as the insured in *Koehnen*, and as such the resulting Stipulated Settlement is collusive as a matter of law. General Casualty misses the mark with this argument. In *Koehnen*, the defendant insured, though abandoned by her own insured, was represented by her father’s insurance carrier when entering into the *Miller-Shugart* settlement—thereby obviating the purpose of the *Miller-Shugart* doctrine of protecting truly abandoned insureds entitled to coverage. In this case, the third-party complaint framed Penn-Co as the plaintiff, asserting claims against ESM as the third-party defendant. General Casualty repeatedly denied ESM’s tender of defense as to Penn-Co’s third-party claims—therefore, at the time of the Stipulated Settlement, ESM was truly an “abandoned insured” requiring the protection of

the *Miller-Shugart* doctrine. By the time the Stipulated Settlement was reached, ESM had attempted to tender the defense of the third-party claim to General Casualty, which had been refused. Finally, Penn-Co, as third-party plaintiff, in agreeing to the Stipulated Settlement, bore all of the risk of attempting to recoup the settlement amounts from General Casualty—the traditional posture of a judgment creditor under a *Miller-Shugart* settlement. Though there are differences between this case and the traditional posture of a *Miller-Shugart* agreement (i.e. the third-party nature of the claims, and the fact that Penn-Co was also claiming insured status under the same policies as the abandoned insured, ESM), the court finds that this case is *not* factually on point with *Koehnen*, and therefore, the Stipulated Settlement is not collusive as a matter of law under the *Koehnen* reasoning. Second, in spite of Penn-Co’s assertion to the contrary, under Minnesota law the Stipulated Settlement does not raise a presumption which the insurer (General Casualty) must rebut. Rather, it is Penn-Co’s burden to establish coverage, that the Stipulated Settlement was reasonable and prudent, and that the Stipulated Settlement was not the result of fraud or collusion. *See Reko*, 70 F. Supp. 2d at 1001; *Vetter*, 84 F. Supp. at 1354-55. Therefore, it is clear that General Casualty can, and does, challenge the Stipulated Settlement on the basis of reasonableness/prudence and fraud/collusion.

In *General Casualty I*, following a bench trial, it was determined that General Casualty did have a duty to defend and indemnify ESM for “property damage” due to an “occurrence,” other than to the roof itself, but that damage to the roof itself was not covered by the policies—therefore, the coverage element is met. However, upon turning to the reasonableness/prudence and fraud/collusion considerations, it is clear that summary judgment cannot be granted to either party on this issue. As General Casualty points out and Penn-Co does not dispute, there is no allocation of the settlement amount between covered and non-covered damages, despite the fact that Penn-Co and ESM had the benefit

of the December 24, 2002, Order, defining what damages were, and were not, covered under the policies at the time the Stipulated Settlement was drafted. In support of its argument that failure to allocate indicates an unreasonable settlement, General Casualty points to the case of *Ebenezer Society v. Dryvit Systems, Inc.*, 453 N.W.2d 545 (Minn. Ct. App. 1990). In *Ebenezer*, the plaintiff, a non-profit organization, obtained funds to construct an apartment building for the elderly and handicapped, and procured a general contractor to those ends. *Id.* at 546-47. Eventually, defendant Dryvit was subcontracted to furnish the external insulation and wall finish system on the building. Dryvit was insured by various insurers for comprehensive general liability insurance over the course of its operations. *Id.* at 547. Following completion of the building, leaks began to occur and Dryvit's wall finish system was a suspected culprit. Ebenezer sued Dryvit for supplying a defective product in breach of its contract. Dryvit eventually tendered defense of the action to its insurers. Approximately a month after the tender of defense, Dryvit entered into a *Miller-Shugart* settlement with plaintiff Ebenezer in which Dryvit agreed to entry of judgment against it in the amount of \$1,000,000, and Ebenezer agreed it would only seek payments from Dryvit's insurers. Subsequently, Ebenezer instituted a garnishment action on the insurers to collect the *Miller-Shugart* settlement. In addition to finding that Ebenezer had not complied with certain procedural requirements in bringing the garnishment action, the trial court held that Ebenezer had failed to establish probable cause that the insurers were liable. Ebenezer appealed. As to this issue, the Minnesota Court of Appeals held:

Although Ebenezer's claims in addition to the building and structural damages claims may have been covered under the comprehensive general liability policies, there was no allocation in the settlement for covered and non-covered items of damage. Accordingly, the trial court was correct in finding

Ebenezer failed to establish probable cause. *See Bor-Son [Building Corp v. Employers Commercial Union Ins. Co.]*, 323 N.W.2d [58,] 64 [(Minn. 1982)].

Id. at 548-49; *see Sphere Drake Ins. Co. v. Tremco, Inc.*, 513 N.W.2d 473, 478-79 (Minn. Ct. App. 1994) (analyzing application of business risk exception, and distinguishing *Ebenezer* as based on breach of contract action in which there was a *Miller-Shugart* settlement agreement). Along the same lines, the Minnesota Supreme Court has likewise held that failure of a *Miller-Shugart* agreement, which the plaintiff entered into with multiple defendants, to allocate damages among those defendants was unreasonable as a matter of law. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 331 (Minn. 1993) (“When a Miller-Shugart release is challenged on reasonableness grounds, no trial on the merits of the tort claim has been had. Without knowing what each defendant has agreed to pay as its share, there is no way of judging the reasonableness or prudence of the agreement from the standpoint of each defendant.”).

Like *Ebenezer*, the third-party claims asserted by Penn-Co against ESM were grounded in breach of contract—the Stipulated Settlement acknowledges as much: “General Casualty[’s] . . . denial of coverage has resulted in ESM’s breach of its contractual duties to defend and indemnify Penn Co in this lawsuit and has, therefore, caused Penn Co compensable damages in the amount of \$1,633,322.50.” Deft.’s Supp. App. at 249. Additionally, the Stipulated Settlement was signed by Penn-Co and ESM in June 2003, nearly six months after the entry of the December 24, 2002, Order, defining what was covered and non-covered under the policies ESM procured—yet, the Stipulated Settlement says only that “upon full reflection of the facts and law bearing upon this matter, [the settlement amount] constitutes a reasonable valuation of the exposure to ESM under the circumstances.” Deft.’s Supp. App. at 249. Another concern, in assessing reasonableness,

is the fact that the dollar amount of the settlement is *not* static *within* the Stipulated Settlement:

- Recitals—paragraph 8: noting that General Casualty’s denial of defense/indemnification has caused ESM to breach its duties to Penn-Co, and “caused Penn Co compensable damages in the amount of \$1,633,322.50”
- Recitals—paragraph 9: stating that upon consideration of the facts and law, Penn-Co and ESM concluded that “\$1,655,322.50 constitutes a reasonable valuation of the exposure to ESM under the circumstances.”
- Agreement—paragraph 1: noting that Penn-Co shall be entitled to a judgment against ESM, and ESM will allow such a judgment to enter, for “damages sustained on account of the third-party claims in the sum of \$1,616,322.50”
- Agreement-paragraph 2, subdivision a: “ESM stipulates to a judgment against it in favor of Penn Co in the amount of \$1,655,322.50 inclusive of costs and disbursements.”

No reason is given for these discrepancies. General Casualty additionally asserts that the posture of the Stipulated Settlement—namely, the timing of the settlement and the fact that ESM’s contribution to the UNI settlement was valued at only \$700,000, not the \$1.6 million set forth in the Stipulated Settlement—are indicia of fraud or collusion, thereby voiding any binding effect the Stipulated Settlement could have on General Casualty. At oral argument, Penn-Co averred that the reason there is no allocation between covered and non-covered damages is precisely because the entire Stipulated Settlement amount *is covered* by the General Casualty policies. Penn-Co contends that the approximately \$1.6 million amount encompasses the \$550,000 that Penn-Co was to contribute to the settlement with UNI pursuant to the agreement with its subcontractors, and \$1.1 million in attorney’s fees that Penn-Co had incurred in the underlying action. If Penn-Co’s assertion is correct,

it would likely dispel any allocation requirement imposed by Minnesota law. Further, while Penn-Co proffers a logical explanation for the Stipulated Settlement amount, it has not succeeded on the record in foreclosing genuine issues of material fact as to the reasonableness of the Stipulated Settlement and as to whether the Stipulated Settlement is the result of fraud and/or collusion.

At this juncture, summary judgment as to the binding effect, if any, of the Stipulated Settlement on the insurer, General Casualty, is inappropriate. This is so because, as discussed in detail above, genuine issues of material fact exist as to the reasonableness/prudence of the settlement and whether the settlement is the result of fraud and/or collusion. At trial, the burdens of proof established by Minnesota law shall apply—thereby, Penn-Co must establish affirmatively the reasonableness of the settlement, and in the negative, that it was not the result of fraud or collusion. Likewise, General Casualty shall be allowed to challenge the Stipulated Settlement on reasonableness and/or fraud grounds. Penn-Co’s motion for summary judgment, insofar as it seeks judgment to be entered in its favor according to the Stipulated Settlement is **denied in part**.

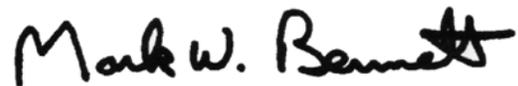
III. CONCLUSION

For the reasons set forth above, both General Casualty’s and Penn-Co’s motions for summary judgment (Doc. Nos. 26 & 27) are **granted in part and denied in part**. The court has found that Penn-Co is an “insured” under the 2000-2001 Contractor’s Policy and the 1998-1999, 1999-2000, and 2000-2001 Umbrella Policies (“applicable policies”). The court has additionally held that General Casualty is precluded from arguing that “property damage” caused by an “occurrence,” as those terms are defined in the applicable policies, did not take place. A genuine issue of material fact remains as to the following issues, which the parties can address at trial:

- Whether Penn-Co gave the notice required by the notice provisions in the applicable policies and/or whether General Casualty was delayed by any failure to follow the notice provisions and/or any delay in receiving notice.
- Whether the “other insurance” exclusion prevents coverage to Penn-Co.
- Whether the applicable policies provide coverage to Penn-Co, and if so, the extent of that coverage.
- The binding effect, if any, the Stipulated Settlement has on General Casualty—including the reasonableness and prudence of the Stipulated Settlement, as well as whether the Stipulated Settlement was the result of fraud or collusion.
- The amount of damages, if any, that Penn-Co is entitled to should the court find that General Casualty failed to defend and indemnify Penn-Co under the policies.

IT IS SO ORDERED.

DATED this 2nd day of March, 2005.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA