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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

VICTAULIC COMPANY,  
  
Plaintiff,  
  
vs.  
  
AMERICAN HOME ASSURANCE  
COMPANY, et al.,  
  
Defendants.

CASE NO. RG12642929

ORDER GRANTING IN PART AND  
DENYING IN PART THE PARTIES'  
CROSS-MOTIONS FOR SUMMARY  
ADJUDICATION

and Related Cross-Action.

On December 4, 2014, Plaintiff Victaulic Company's ("Victaulic") Motion for Summary Adjudication of issues, pursuant to Code Civ. Proc. section 437c(f)(l) and Defendant American Home Assurance Company, The Insurance Company of the State of Pennsylvania, and National Union Fire Insurance Company's ("AIG Defendants") Motion for Summary Judgment in AIG Defendants' favor and against plaintiff Victaulic Company, pursuant to Code Civ. Proc. § 437c(c), or in the Alternative, for Summary Adjudication of various affirmative defenses, pursuant Code Civ. Proc. § 437c(f)(l) all came for hearing at 03:45 PM in Department 24 before the Honorable Frank Roesch. William J. Goines and William Schofield of Greenburg Traurig appeared on behalf of the AIG defendants; Joseph Jean, Colin Kemp, and Jeffrey Kiburtz of Pillsbury Winthrop Shaw Pittman, and Craig Diamond of Diamond, Baker, Mitchell appeared on behalf of Victaulic Company.

1 The matters being fully briefed, argued, and submitted, it is hereby ORDERED that  
2 the AIG Defendants' Motion is DENIED in its entirety, and the Victaulic Motion is DENIED  
3 as to the Thirteenth and Fourteenth Causes of Action for declarations that Defendants had  
4 and have a duty to indemnify Victaulic in connection with the settlement of the *MWRA* and  
5 *United Hospital* actions; and GRANTED as to the First Cause of Action for a declaration that  
6 Defendants had and have a duty to defend Victaulic in connection with *United Hospital*,  
7 *MWRA* and *Edge Lofts* actions and as to the Third Cause of Action for a declaration that  
8 "occurrence" has the ordinary meaning as used in the relevant insurance policies.

9 **I. FACTUAL BACKGROUND**

10 Victaulic manufactures valves and piping products that are used in various industries,  
11 including building services, HVAC, fire protection, industrial, mining, oilfield, water, and  
12 wastewater. Separate Statement of Undisputed Facts in Support of Motion for Summary  
13 Adjudication ("Victaulic's SUF"), 34.

14 The AIG Defendants provided Victaulic with comprehensive general liability  
15 insurance from about 1998-2012. Victaulic's SUF, 1-2. Specifically, AIG Defendant  
16 American Home Assurance Company ("American Home") entered into commercial general  
17 liability insurance policies with Victaulic, each numbered 4570847, for the periods October  
18 1, 2000 to October 1, 2001; October 1, 2001 to October 1, 2002; October 1, 2002 to October  
19 1, 2003; October 1, 2003 to October 1, 2004; October 1, 2004 to October 1, 2005; October 1,  
20 2005 to October 1, 2006; October 1, 2006 to October 1, 2007; and October 1, 2007 to  
21 October 1, 2008. Separate Statement of Undisputed Facts in Support of Defendants' Motion  
22 for Summary Judgment or, In the Alternative, Summary Adjudication ("AIG's SUF"), 38.  
23 AIG Defendant The Insurance Company of the State of Pennsylvania ("ICSOP") entered into  
24 commercial general liability insurance policies with Victaulic, each numbered 4572817, for  
25 the periods October 1, 2008 to October 1, 2009; October 1, 2009 to October 1, 2010; October  
26 1, 2010 to October 1, 2011; and October 1, 2011 to October 1, 2012. AIG's SUF, 39. The  
27 Parties agree that the terms and conditions of the American Home and ICSOP insurance  
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1 policies (the “Primary Insurance Policies”) “are materially identical.” AIG’s SUF, 40;  
2 Victaulic’s SUF, 86.

3 Under each Primary Insurance Policy, the respective AIG Defendant agreed “to pay  
4 those sums that the insured becomes legally obligated to pay as damages because of ‘bodily  
5 injury’ or ‘property damage’ to which this insurance applies.” Victaulic’s SUF, 7; AIG’s  
6 SUF, 41. Subject to the terms and conditions in the Primary Insurance Policies, the insurance  
7 applies to damages because of “bodily injury” or “property damage” that takes place during  
8 the policy period if the “bodily injury” or “property damage” is caused by an “occurrence.”  
9 AIG’s SUF, 42; Victaulic’s SUF, 9-10. “Occurrence” is defined in the Primary Insurance  
10 Policies as “an accident, including continuous or repeated exposure to substantially the same  
11 general harmful conditions.” AIG’s SUF, 43; Victaulic’s SUF, 13-14.

12 The Primary Insurance Policies also include specific Products/Completed Operations  
13 Hazard coverage. Victaulic’s SUF, 15, 17. This coverage “includes all ‘bodily injury’ and  
14 ‘property damage’ occurring away from premises you own or rent and arising out of ... ‘your  
15 product’ ... .” Victaulic’s SUF, 16, 18. “Your product” is defined to include “any goods or  
16 products, other than real property, manufactured, sold, handled, distributed or disposed of  
17 by” Victaulic. Victaulic’s SUF, 19, 20.

18 AIG Defendant National Union Fire Insurance Company of Pittsburg, PA (“National  
19 Union”) entered into commercial umbrella insurance policies with Victaulic, numbered  
20 7393587 (for the period October 1, 2001 to October 1, 2002); 2131483 (October 1, 2002 to  
21 October 1, 2003), 3206083 (October 1, 2003 to October 1, 2004), 2684691 (October 1, 2004  
22 to October 1, 2005), 2023632 (October 1, 2008 to October 1, 2009), 2023816 (October 1,  
23 2009 to October 1, 2010), and 4241040 (October 1, 2010 to October 1, 2011). AIG’s SUF,  
24 44. AIG Defendant American Home entered into commercial umbrella insurance policies  
25 with Victaulic, numbered BE 4765902 (for the period October 1, 2005 to October 1, 2006),  
26 BE 6849335 (October 1, 2006 to October 1, 2007) and BE 7250969 (October 1, 2007 to  
27 October 1, 2008). AIG’s SUF, 45. Again, the Parties agree that the terms and conditions of  
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1 the American Home and National Union umbrella insurance policies (collectively, the  
2 “Umbrella Insurance Policies”) “are materially identical.” AIG’s SUF, 46.

3 Under each Umbrella Insurance Policy, the respective insurer “will pay on behalf of  
4 the Insured those sums in excess of the Retained Limit that the Insured becomes legally  
5 obligated to pay as damages by reason of liability imposed by law because of Bodily Injury  
6 or Property Damage ... to which this insurance applies.” AIG’s SUF, 47; Victaulic’s SUF, 8.  
7 Subject to the terms and conditions stated therein, each Umbrella Policy applies if the  
8 “Property Damage is caused by an Occurrence ... and the ... Property Damage occurs during  
9 the Policy Period”. AIG’s SUF, 48; Victaulic’s SUF, 9-10. The relevant definitions and  
10 exclusions in the Umbrella Insurance Policies are the same or materially the same as those  
11 found in the Primary Insurance Policies. AIG’s SUF, 49; Victaulic’s SUF, 6.

12 AIG Defendant National Union also entered into excess liability policies with  
13 Victaulic (the “Excess Insurance Policies”), numbered 8764606 (for the period October 1,  
14 2004 to October 1, 2005), and 8764630 (October 1, 2005 to October 1, 2006). AIG’s SUF,  
15 50. The Excess Insurance Policies apply in excess of all other insurance, and, subject to the  
16 additional terms and conditions therein, “follow the terms, definitions, conditions and  
17 exclusions of” the respective Primary Insurance Policies. AIG’s SUF, 51. The Primary  
18 Insurance Policies, Umbrella Insurance Policies and Excess Insurance Policies are  
19 collectively referred to as the “Insurance Policies”. When the damages sought by an  
20 underlying claimant potentially come within the scope of coverage provided by the Insurance  
21 Policies, the respective AIG Defendant has “the right and duty to defend the insured against  
22 any ‘suit’ seeking those damages.” Victaulic’s SUF, 29-30. As to the Umbrella and Excess  
23 Insurance Policies, the duty to defend arises when “the total applicable limits of Scheduled  
24 Underlying [Primary] Insurance have been exhausted by payment of Loss” to which the  
25 policy applies “and the total applicable limits of Other Insurance have been exhausted.”  
26 AIG’s SUF, 32.

1 Victaulic and the AIG Defendants disagree as to the coverages provided under the  
2 Insurance Policies for nine underlying actions brought against Victaulic in California,  
3 Colorado, Oregon, Washington, Massachusetts and West Virginia. AIG's SUF, 1-2.

## 4 II. THE PARTIES' MOTIONS

5 Victaulic timely moved pursuant to California Code of Civil Procedure section 437c  
6 for an order summarily adjudicating in Victaulic's favor its First Cause of Action for a  
7 declaration concerning whether one or more of the AIG Defendants has or had a duty to  
8 defend Victaulic in connection with *United Hospital Center Inc. v. Victaulic Co.*, Case No.  
9 1:12-CV-00019-IMK (United States District Court, Northern District of West Virginia)  
10 ("*United Hospital*"), *Massachusetts Water Resources Auth. v. JF. Shea Co., Inc., et al.*, Civil  
11 Action No. 2011-2184 H (Superior Court of Suffolk County, Massachusetts) ("*MWRA*"),  
12 and/or *Edge Lofts Master Condo. Ass'n, et al. v. Victaulic Co.*, Case No. 3:13-cv-00492-MO  
13 (United States District Court, District of Oregon); its Third Cause of Action for a declaration  
14 concerning the meaning of "occurrence" as used in the relevant Insurance Policies; its  
15 Thirteenth Cause of Action for a declaration concerning whether one or more of the AIG  
16 Defendants has or had a duty to indemnify Victaulic in connection with the settlement of the  
17 *MWRA* action; and its Fourteenth Cause of Action for a declaration concerning whether one  
18 or more of the AIG Defendants has or had a duty to indemnify Victaulic in connection with  
19 the settlement of the *United Hospital* action.

20 AIG Defendants American Home, ICSOP, and National Union timely moved  
21 pursuant to Cal. Code of Civ. Proc. § 437c for summary judgment in their favor and against  
22 Victaulic on the grounds that, under California's choice of law analysis, Pennsylvania law  
23 governs the interpretation of the insurance policies; that coverage is precluded because, under  
24 applicable Pennsylvania law, there is no "occurrence" based upon the faulty workmanship  
25 doctrine; that coverage is precluded because coverage under the insurance policies for  
26 "property damage" requires damage to third party property; that coverage is precluded by the  
27 "business risk" exclusions in the policies; that coverage is precluded for breach of contract  
28

1 and breach of warranty claims because such claims are not “occurrences” or “property  
2 damage” under the insurance policies.

3           AIG Defendants American Home, ICSOP, and National Union also moved, in the  
4 alternative, for an order summarily adjudicating pursuant to California Code of Civil  
5 Procedure section 437c(f)(1) its “affirmative defenses” that, under California’s choice of law  
6 analysis, Pennsylvania law governs the interpretation of the insurance policies; that coverage  
7 is precluded because, under applicable Pennsylvania law, there is no “occurrence” based  
8 upon the faulty workmanship doctrine; that coverage is precluded because coverage under  
9 the insurance policies for “property damage” requires damage to third party property; that  
10 coverage is precluded by the “business risk” exclusions in the policies; and/or that coverage  
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12 is precluded for breach of contract and breach of warranty claims because such claims are not  
13 “occurrences” or “property damage” under the insurance policies.

### 14                                   **III.    APPLICABLE LEGAL STANDARDS**

#### 15    **A.    Summary Judgment / Summary Adjudication**

16           Summary judgment is properly granted “if all the papers submitted show that there is  
17 no triable issue as to any material fact and that the moving party is entitled to a judgment as a  
18 matter of law. Code Civ. Proc. § 437c(c).

19           “A party may move for summary adjudication as to one or more causes of action  
20 within an action, one or more affirmative defenses, one or more claims for damages, or one  
21 or more issues of duty.” *Id.* §437c(f)(1). “A motion for summary adjudication shall be  
22 granted only if it completely disposes of a cause of action, an affirmative defense, a claim for  
23 damages, or an issue of duty.” *Id.* The motion “shall be granted if all the papers ... show  
24 that there is no triable issue as to any material fact and that the moving party is entitled to  
25 judgment as a matter of law.” *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 464 (1997).

26           As plaintiff, Victaulic is deemed to have met its “burden of showing that there is no  
27 defense to a cause of action if [Victaulic proves] each element of the cause of action entitling  
28 [it] to judgment on that cause of action.” Code Civ. Proc. §437c(p) (1). Moving defendants

1 can meet their burden by demonstrating that “a cause of action has no merit, which they can  
2 do by showing that ‘[o]ne or more elements of the cause of action cannot be ... established  
3 ...’” and/or by demonstrating an affirmative defense bars the claim entirely. *Nazir v. United*  
4 *Airlines, Inc.*, 178 Cal.App.4th 243, 253-54 (2009) (citing Code Civ. Proc. §437c(o)). “Once  
5 defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable  
6 issue of material fact.” *Id.* (citations omitted).

7 **B. Conflict of Laws**

8 “Interpretation of an insurance policy is a question of law and follows the general  
9 rules of contract interpretation.” *Regional Steel Corp. v. Liberty Surplus Ins. Corp.*, 226 Cal.  
10 App. 4th 1377, 1389 (2014). The language in an insurance contract “must be interpreted as a  
11 whole, and in the circumstances of the case, and cannot be found to be ambiguous in the  
12 abstract. Courts will not strain to create an ambiguity where none exists.” *Id.*; *see also*  
13 *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d  
14 888 (Pa. 2006) (“The interpretation of an insurance policy is a question of law.... Our primary  
15 goal in interpreting a policy, as with interpreting any contract, is to ascertain the parties’  
16 intentions as manifested by the policy’s terms.”). The “burden is on the insured to establish  
17 that the claim is within the scope of the policy’s coverage.” *Oglio Entertainment Group, Inc.*  
18 *v. Hartford Cas. Ins. Co.*, 200 Cal.App.4th 573, 582 (2011); *see also Executive Risk Indem.,*  
19 *Inc. v. Cigna Corp.*, 74 A.3d 179, 182 (Pa. Super. 2013) (“insured must show claim comes  
20 within coverage provided by policy”).

21 In interpreting an insurance policy, “the mutual intention of the parties at the time the  
22 contract is formed governs interpretation,” but “[s]uch intent is to be inferred, if possible,  
23 solely from the written provisions of the contract.” *MacKinnon v. Truck Ins. Exchange*, 31  
24 Cal. 4th 635, 647 (2003) (citations omitted). Although “[t]he ‘clear and explicit’ meaning of  
25 these provisions, interpreted in their ‘ordinary and popular sense’ ... controls judicial  
26 interpretation,” policy language must be “interpreted broadly so as to afford the greatest  
27 possible protection to the insured.” *Id.* at 647-48 (citations and quotations omitted); *see also*  
28 *Sylvania Gardens Apartments v. Legion Ins. Co.*, 2001 WL 1807780 (Pa. Com. Pl. Feb. 14,

1 2001) (insuring agreements are construed “broadly so as to afford the greatest possible  
2 protection to the insured”) (citing *Eichelberger v. Warner*, 290 Pa. Super. 269, 275, 434 A.2d  
3 747, 750 (1981)). If an insurance policy provision can reasonably be interpreted in more than  
4 one way, the Court must find “coverage so long as there is any ... reasonable interpretation  
5 under which recovery would be permitted.” *MacKinnon*, 31 Cal.4th at 655; *see also*  
6 *Butterfield v. Giuntoli*, 448 Pa. Super. 1, 14, 670 A.2d 646, 652 (1995) (when a term is  
7 “reasonably susceptible of more than one meaning,” the term “must be construed in the light  
8 most favorable to the insured”). Similarly, “exclusionary clauses are interpreted narrowly  
9 against the insurer.” *MacKinnon* at 648; *see also Pecorara v. Erie Ins. Exch.*, 408 Pa. Super.  
10 153, 156, 596 A.2d 237, 239 (1991) (exclusions and other coverage-limiting clauses “are  
11 narrowly construed against the insurer”); *Swarner v. Mut. Ben. Grp.*, 72 A.3d 641, 645 (Pa.  
12 Super. 2013) (“[e]xclusionary clauses generally are strictly construed against the insurer and  
13 in favor of the insured”).

14 Accordingly, regardless of whether the California or Pennsylvania law is applied, the  
15 Court is to give ordinary, straight-forward meaning to policy language and construe it in a  
16 light most favorable to finding coverage. As such, this Court can apply California law as the  
17 law of the forum because there is no genuine conflict of laws. *Hurtado v. Superior Court*, 11  
18 Cal. 3d 574, 581 (1974); *see also Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*,  
19 14 Cal. App. 4th 637, (1993) (“The fact that two states are involved does not in itself indicate  
20 that there is a ‘conflict of laws’ or ‘choice of law’ problem.”).

#### 21 IV. DISPOSITION

##### 22 A. Victaulic’s Motion for Summary Adjudication

- 23 1. Victaulic’s First Cause of Action for a declaration that one or more of the AIG  
24 Defendants has or had a duty to defend Victaulic in connection with *United*  
*Hospital, MWRA, and/or Edge Lofts.*

25 On a motion for summary adjudication involving the duty to defend, an insurer has “a  
26 higher burden than the insured.” *American States Ins. Co. v. Progressive Cas. Ins. Co.*, 180  
27 Cal.App.4th 18, 26-27 (2009). “[T]he insured need only show that the underlying claim *may*  
28 fall within policy coverage.” *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal.4th 287, 300 (1993)



1 (emphasis in original). On the other hand, “the insurer must prove it *cannot*.” *Id.* Therefore,  
2 to prevail here AIG “must present undisputed facts that eliminate any possibility of  
3 coverage.” *Am. States Ins. Co.*, 180 Cal. App. 4th at 26-27. “Facts merely tending to show  
4 that the claim is not covered, or may not be covered, but are insufficient to eliminate the  
5 possibility that resultant damages (or the nature of the action) will fall within the scope of  
6 coverage, therefore add no weight to the scales.” *Montrose*, 6 Cal.4th at 300. If coverage  
7 depends on an unresolved dispute over a factual question, the very existence of that dispute  
8 establishes that there is a possibility for coverage and hence a duty to defend. *Horace Mann*  
9 *Ins. Co. v. Barbara B.*, 4 Cal.4th 1076, 1085 (1993).<sup>1</sup>

10 Victaulic purchased insurance from AIG covering “all ‘bodily injury’ and ‘property  
11 damage’ ... arising out of ‘your product’.” Victaulic’s SUF, 1-2, 15-20, 86. The plaintiffs in  
12 the *United Hospital*, *MWRA*, and *Edge Lofts* cases each allege claims for negligence and  
13 products liability against Victaulic for third-party property damage resulting from Victaulic’s  
14 products. The plaintiff in *United Hospital* asserted counts against Victaulic for products  
15 liability and negligence for damages suffered in a “catastrophic disconnection” of two water  
16 pipes that released “thousands of gallons of water” at separate locations in the nearly-  
17 complete hospital project, resulting in damage to property other than the Victaulic product.  
18 Victaulic’s SUF 27, 35. The plaintiff in *MWRA* asserted claims against Victaulic for product  
19 liability and negligence for property damage resulting from a 10-foot diameter water line that  
20 burst, also resulting in damage to other property. Victaulic’s SUF 28, 36. And the plaintiffs  
21 in *Edge Lofts* asserted counts against Victaulic for strict product liability and negligence for  
22 damages to other property allegedly suffered when several Victaulic Pressfit couplings  
23 leaked. Victaulic’s SUF 30-31.

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26 <sup>1</sup> Pennsylvania law is no different. *See, e.g., Am. & Foreign Ins. Co. v. Jerry’s Sport*  
27 *Center, Inc.*, 606 Pa. 584, 596, 608, 2 A.3d 526, 533, 540 (2010) (the “duty to defend is  
28 *Erie Ins. Exch. v. Transamerica Ins. Co.*, 516 Pa. 574, 583, 533 A.2d 1363, 1368 (“obligation  
to defend arises whenever the complaint filed by the injured party may *potentially* come  
within the coverage of the policy.”) (emphasis in original, citations omitted).

1 Here, the Court concludes that the claims in the underlying *United Hospital, MWRA*,  
2 and *Edge Lofts* cases give rise to the potential for coverage under the relevant insuring  
3 agreements because the claimants in each of the cases seek to hold Victaulic liable for  
4 “property damage” caused by an “occurrence.” Because the AIG Defendants have not  
5 presented “undisputed facts that eliminate any possibility of coverage,” they have the duty to  
6 defend Victaulic against those claims. *Id.*; *Am. & Foreign Ins. Co.*, 606 Pa. at 596, 608.

7 Victaulic’s request for a judicial declaration that one or more of the AIG Defendants  
8 has or had a duty to defend Victaulic in connection with the *United Hospital, MWRA*, and  
9 *Edge Lofts* actions is therefore GRANTED.

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12 2. Victaulic’s Third Cause of Action for a declaration concerning the meaning of  
13 “occurrence” as used in the relevant Insurance Policies.

14 The AIG Defendants have taken the position that Pennsylvania law governs this  
15 dispute and that, under Pennsylvania law, third-party property damage claims arising from  
16 faulty workmanship are not “occurrences” under the subject policies. *E.g.*, *Points & Auth.*,  
17 14:10-11. Victaulic has taken the position that the underlying cases raise claims that are  
18 based on an “occurrence” irrespective of whether Pennsylvania or California law is applied.  
19 The Court agrees with Victaulic’s position – even if AIG were correct that Pennsylvania law  
20 applies, summary adjudication in Victaulic’s favor is appropriate.

21 In *Indalex Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 83 A.3d 418  
22 (2013), a Pennsylvania appellate court specifically rejected the arguments AIG makes here,  
23 finding that property damage resulting from faulty workmanship does constitute an  
24 “occurrence” under policy language not materially different than the language at issue in this  
25 case. *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589  
26 Pa. 317, 908 A.2d 888 (2006), upon which AIG principally relies, is not to the contrary and  
27 in any event distinguishable, as the underlying case involved an alleged breach of contract  
28 and no damage to property other than the insured’s own work. Victaulic’s SUF 27-28, 30-

1 31, 35-36. Further, while AIG points the Court to numerous, mostly federal court decisions  
2 construing Pennsylvania law, all of those decisions are distinguishable on grounds that they  
3 either did not involve any damage to property other than the insured's own work or asserted  
4 breaches of obligations arising under contract.

5 As the terms in an insurance policy must be construed in their ordinary and plain  
6 sense, the term "occurrence" encompasses the circumstances as alleged by the plaintiffs in  
7 the underlying cases. *See, e.g.*, AIG's Points & Auth., 11:9-10 ("Under California law, faulty  
8 workmanship can be an occurrence if it causes 'property damage' to other property besides  
9 the insured's work or product."); *Indalex*, 83 A.3d at 418 ("Because the underlying  
10 complaints alleged defective products resulting in property loss, to property other than [the  
11 insured's] products, and personal injury, we conclude there was an 'occurrence' and reverse  
12 the order granting summary judgment."). The concept of "occurrence" must be construed  
13 broadly to reflect the wide variety of circumstances which can result in property damage or  
14 bodily injury that an ordinary person would consider "accidental," even if the conduct giving  
15 rise to the insured's liability was deliberate or intentional. The AIG Defendants' unduly  
16 limiting interpretation of "occurrence" is contrary to these principles, and would effectively  
17 eliminate coverage for what may have been a central focus of the parties during the  
18 underwriting of the policies – product liability lawsuits brought against Victaulic. The AIG  
19 Defendants do not otherwise raise any triable issue of material fact that would preclude the  
20 summary adjudication of Victaulic's Third Cause of Action for a declaration that the  
21 meaning of "occurrence" as used in the relevant Insurance Policies includes faulty  
22 workmanship or defective products resulting in damage to property other than the insured's  
23 work or product. Victaulic's request for summary adjudication as to its Third Cause of  
24 Action is therefore GRANTED.

- 25 3. Victaulic's Thirteenth Cause of Action for a declaration that one or more of  
26 the AIG Defendants has or had a duty to indemnify Victaulic in connection  
with the settlement of the MWRRA action.

27 Victaulic's Thirteenth Cause of Action seeks a declaration that the entire settlement in  
28 MWRRA is subject to coverage under the indemnity provisions in the Insurance Policies.

1 Citing, for example, *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*,  
2 404 Mass. 103, 107, 533 N.E.2d 1350 (1989), Victaulic asserts that, under Massachusetts'  
3 application of the economic loss doctrine, the *MWRA* plaintiff is precluded as a matter of law  
4 from recovering in tort from Victaulic the costs of repair or replacement of the Victaulic  
5 product. From this, Victaulic argues, it follows that no portion of the settlement of that case  
6 can, as a matter of law, be allocated to such unrecoverable damages. AIG disagrees,  
7 contending that "[t]here are many differing, fact-driven scenarios surrounding the economic  
8 loss issue, which were never resolved because the *MWRA* case settled." AIG's SUF 42.

9 The Court concludes that, in moving for summary adjudication, Victaulic failed to  
10 establish as a matter of law that no portion of the *MWRA* settlement was apportioned to the  
11 cost of repair or replacement of the Victaulic product involved in the *MWRA* litigation.  
12 There is a triable issue of fact as to what portion of the settlement is for covered losses and  
13 must be indemnified. Victaulic's motion for summary adjudication of its Thirteenth Cause of  
14 Action is therefore DENIED.

15 4. The Fourteenth Cause of Action for a declaration that one or more of the AIG  
16 Defendants has or had a duty to indemnify Victaulic in connection with the  
settlement of the *United Hospital* action.

17 Acknowledging that AIG Defendants eventually paid that portion of the *United*  
18 *Hospital* settlement that exceeded the policy deductible (Victaulic's SUF 67), Victaulic seeks  
19 summary adjudication of its request for a judicial determination that such payment not made  
20 subject to AIG Defendants' purported right to seek reimbursement. AIG opposes such a  
21 determination, claiming that disputed issues of material fact remain as to the AIG  
22 Defendants' obligation to indemnify Victaulic for such sums. AIG's SUF 44-47.

23 The Court concludes that, in moving for summary adjudication on its Fourteenth  
24 Cause of Action, Victaulic failed to establish as a matter of law that, *inter alia*, the entirety of  
25 the *United Hospital* settlement was for covered losses and therefore subject to  
26 indemnification by the AIG Defendants. Because there remain triable issues of material fact,  
27 Victaulic's motion for summary adjudication of its Fourteenth Cause of Action is DENIED.  
28

1 **B. AIG Defendants' Motion for Summary Judgment**

2 For the reasons set forth herein, the AIG Defendants have not shown that Victaulic's  
3 Second Amended Complaint is entirely devoid of any triable issue as to any material fact.  
4 Their motion for summary judgment is therefore DENIED. Code Civ. Proc. § 437c(c).

5 **C. AIG Defendants' Motion for Summary Adjudication**

- 6 1. AIG's "affirmative defense" that, under California's choice of law analysis,  
7 Pennsylvania law governs the interpretation of the insurance policies.

8 The AIG Defendants request summary adjudication of their "affirmative defense" that  
9 "[u]nder California's choice of law analysis, Pennsylvania law governs the interpretation of  
10 the insurance policies." Points & Auth., p.1. Choice of law, however, is not an "affirmative  
11 defense" and has not been pled as such by AIG Defendants in their answer to the Second  
12 Amended Complaint. Victaulic's SUF 47. Choice of law is a legal issue. *See Frontier*, 153  
13 Cal. App. 4th at 1447. Section 437c(s) permits summary adjudication of a legal issue "only  
14 upon the stipulation of the parties." Code Civ. Proc. §437c(s). There is no such stipulation  
15 and, accordingly, no basis to summarily adjudicate this issue. The AIG Defendants' motion  
16 for summary adjudication of its "affirmative defense" that Pennsylvania law applies to the  
17 determination of coverage is therefore DENIED.

- 18 2. AIG's "affirmative defense" that coverage is precluded because, under  
19 applicable Pennsylvania law, there is no "occurrence" based upon the faulty  
20 workmanship doctrine.

21 The AIG Defendants' motion for a summary determination that "coverage is  
22 precluded because, under applicable Pennsylvania law, there is no occurrence based upon the  
23 faulty workmanship doctrine" (AIG's Points & Auth., p. 1) is DENIED for the reasons set  
24 forth above.

- 25 3. AIG's "affirmative defense" that coverage is precluded because coverage  
26 under the insurance policies for "property damage" requires damage to third  
27 party property

28 AIG also asks the Court to summarily conclude that all "[c]overage is precluded  
because coverage under the insurance policies for 'property damage' requires damage to  
third party property." Notice of Motion, pp. 1-2. This request, too, is DENIED. At least

1 some portion of the damages claimed in the underlying cases relate to property damage to  
2 third-party property. This renders AIG Defendants' request such that it would not  
3 "completely dispose of an entire substantive area" and is therefore inappropriate for summary  
4 adjudication. *See Catalano v. Superior Court*, 87 Cal.App.4th 91, 96-97 (2000) ("clear  
5 intent" of Section 437c(f)(1) is to "stop the practice of piecemeal adjudication" of discrete  
6 issues and a "decision which disposed of certain factual allegations without disposing of the  
7 entire claim" is reversible error); Code Civ.Proc. § 437c(f)(1).

8 4. AIG's "affirmative defense" that coverage is precluded by the "business risk"  
9 exclusions in the policies.

10 Claiming that any coverage Victaulic might be entitled to "is precluded by the  
11 'business risk' exclusions in the policies," AIG Defendants seek summary adjudication of  
12 this issue as well. AIG's Notice of Motion, p. 2. In particular, they assert that the "your  
13 product" and "impaired property" exclusions preclude coverage for damage to Victaulic's  
14 "own product" or "property which is not injured but is otherwise made less useful because it  
15 incorporates the insured's allegedly defective product." AIG's Points & Auth., 18:20-23.

16 Because the underlying claims against Victaulic have not been shown to consist of  
17 only damages to Victaulic's "own product" or "impaired property" (Victaulic's SUF 27-28,  
18 30-31, 35-36), AIG Defendants' current request would not "completely dispose[] of a cause  
19 of action, an affirmative defense, a claim for damages, or an issue of duty." Code Civ.Proc.  
20 § 437c(f)(1). As such, AIG Defendants' request that the Court summarily declare that  
21 coverage under the Insurance Policies is precluded by the "business risk" exclusion is  
22 DENIED.

23 5. AIG's "affirmative defense" that coverage is precluded for breach of contract  
24 and breach of warranty claims because such claims are not "occurrences" or  
"property damage" under the insurance policies.

25 AIG's request for summary adjudication of its "affirmative defense" that "coverage is  
26 precluded for breach of contract and breach of warranty claims because such claims are not  
27 'occurrences' or 'property damage' under the insurance policies" (AIG's Notice of Motion,  
28 p. 2) is DENIED. AIG does not identify any affirmative defense pled in its answer to the

1 operative complaint, and none appears to exist. Victaulic's SUF 47. Further, AIG does not  
2 identify any breach of contract or warranty allegations in the underlying claims that might be  
3 subject to this limitation. Even it had, since it is not disputed that all of the underlying  
4 actions to which AIG's motion is directed involve tort claims against Victaulic (Victaulic  
5 SUF 49), the requested adjudication would not completely dispose of any claim before the  
6 court. Code Civ.Proc. § 437c(f)(1).

7  
8 **IT IS SO ORDERED.**

9  
10 January 21, 2015

11  
12 By: 

Hon. Frank Roesch  
Judge, Alameda County Superior Court

13 Submitted by:

14 PILLSBURY WINTHROP SHAW PITTMAN LLP

15  
16 By: \_\_\_\_\_  
17 Colin T. Kemp  
18 Attorneys for Plaintiff  
VICTAULIC COMPANY

19 Approved as to Form:  
20 GREENBERG TRAURIG, LLP

21 By \_\_\_\_\_  
22 William J. Goines  
23 Attorneys for Defendants  
24 AMERICAN HOME ASSURANCE COMPANY,  
25 THE INSURANCE COMPANY OF THE STATE OF PA,  
26 and NATIONAL UNION FIRE INSURANCE COMPANY  
27 OF PITTSBURGH, PA  
28