

STATE OF MICHIGAN
COURT OF APPEALS

DOW CORNING CORPORATION and DOW
CORNING WRIGHT CORPORATION,

UNPUBLISHED
October 12, 1999

Plaintiffs-Appellees/Cross-Appellants

v

Nos. 200143; 200144; 200145;
200146; 200147; 200148;
200149; 200150; 200151;
200152; 200153; 200154

Wayne Circuit Court
LC No. 93-325788 CK

CONTINENTAL CASUALTY COMPANY, INC.,
BOSTON OLD COLONY INSURANCE
COMPANY, GREENWICH INSURANCE
COMPANY, f/k/a HARBOR INSURANCE
COMPANY, INC., HIGHLANDS INSURANCE
COMPANY, HOME INSURANCE COMPANY,
ASSOCIATED INTERNATIONAL INSURANCE
COMPANY, ARGONAUT INSURANCE
COMPANY, INC., AMERICAN BANKERS
INSURANCE COMPANY OF FLORIDA,
EMPLOYERS MUTUAL CASUALTY
COMPANY, WESTPORT INSURANCE
CORPORATION, f/k/a PURITAN INSURANCE
COMPANY, f/k/a MANHATTAN FIRE &
MARINE INSURANCE COMPANY,
INTERSTATE FIRE & CASUALTY COMPANY,
INC, UNIGARD SECURITY INSURANCE
COMPANY, INTERNATIONAL INSURANCE
COMPANY, INTERNATIONAL SURPLUS
LINES INSURANCE COMPANY,
COMMERCIAL INSURANCE COMPANY OF
NEWARK, NEW JERSEY, GRANITE STATE
INSURANCE COMPANY, INSURANCE
COMPANY OF THE STATE OF
PENNSYLVANIA, AMERICAN
MANUFACTURERS MUTUAL INSURANCE

COMPANY, and LUMBERMEN'S MUTUAL
CASUALTY COMPANY, INC.,

Defendants-Appellants/Cross-
Appellees,

and

ALLIANZ VERSICHERUNGS, AG, and UNIONE
ITALIANA REINSURANCE COMPANY OF
AMERICA,

Defendants.

Before: Young, Jr., P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

I

UNDERLYING FACTS AND PROCEDURAL BACKGROUND

These appeals stem from the infamous Dow Corning breast implant litigation. Although the case before us involves only Dow Corning¹ and its insurers, some background information is important to put this case in proper context. Over the past thirty-plus years, more than a million women have chosen to have breast-implant surgery. Between 1964 and 1991, many of those women received silicone-filled breast implants manufactured by Dow Corning. While women occasionally reported problems with breast implants during the first two decades of their use, Dow Corning asserted that the implants posed no serious health risks. During this earlier period, the FDA, Dow Corning's insurers, the doctors who performed implant procedures, and the women who chose to receive the implants all appeared to believe that the implants were, in fact, safe. However, in the early 1980s, a theory came to light that asserted that silicone filled breast implants caused severe autoimmune diseases in some women. According to the theory, silicone gel from the implants leaked into women's bodies and caused an autoimmune reaction leading to varied symptoms and diseases including chronic fatigue, arthritis, scleroderma, and lupus, among others. After a few women sued Dow Corning on this theory and won large jury verdicts, a flood of litigation began.

Prior to the flood of breast implant litigation, Dow Corning had purchased an array of "Comprehensive General Liability" (CGL) insurance policies. As the complaints and class actions poured in, Dow Corning contacted many of its insurers and began to formulate a comprehensive plan for defending or settling claims. Dow Corning's strategy involved the hiring of national coordinating counsel, regional counsel, and local counsel, as well as the formulation of standardized defense

arguments. The strategy also eventually came to include a global settlement offer, which was designed to resolve all of the breast implant claims.

There is no dispute that the cost of the breast implant litigation has been staggering. According to Dow Corning, the total reaches approximately four billion dollars. Not surprisingly, the underlying litigation eventually spawned litigation over the nature and extent of the various insurers' liability to defend and indemnify Dow Corning. Some insurers apparently accepted liability and provided Dow Corning coverage up to their policy limits. Some other insurers apparently disputed liability but eventually settled with Dow Corning. This case involves Dow Corning's dispute with a number of remaining insurers, which dispute the parties, unfortunately, have been unable to resolve among themselves.

The insurers in this case fall into two categories. First, there are several high-level excess insurers. They are "excess" insurers because their policies do not provide Dow Corning any coverage until primary and lower-level excess policies have been exhausted. These excess policies do not include a duty on the part of the insurer to provide a defense. However, the policies do provide for payment of some defense costs. Second, there are a group of "foreign primary insurers," consisting of Granite State Insurance Company, Commercial Insurance Company of Newark, N.J., and the Insurance Company of the State of Pennsylvania, which are all affiliated with American International Underwriters (the AIU defendants). These insurers were responsible for defense and indemnification of claims filed outside of the United States, including Canada and certain communist countries, as well as claims filed by foreign nationals in the United States.

All defendants sold Dow Corning "occurrence" policies between 1962 and 1985. These occurrence policies provide coverage when Dow Corning becomes liable for personal injury, property damage, or advertising liability. However, the policies are time-limited; they only provide coverage when there is "personal injury, property damage or advertising liability during the policy period."²

When many of Dow Corning's insurers refused to pay defense and indemnity costs arising from the breast implant litigation, Dow Corning filed a declaratory judgment action against them in Los Angeles Superior Court. In response, the insurers filed their own declaratory judgment action in Wayne Circuit Court and had the California action dismissed. The parties were subsequently realigned to their present status, and Dow Corning filed its amended complaint against defendants. Dow Corning's amended complaint sought declaratory relief against all defendants regarding their duties to defend and indemnify Dow Corning under their respective policies. The amended complaint also included allegations of breach of contract and anticipatory breach of contract.

The case was tried before Wayne Circuit Judge Robert J. Colombo, Jr., in a combined bench and jury trial.³ The jury verdict rejected defendants' affirmative defense that Dow Corning had intentionally or innocently misrepresented or concealed from defendants relevant loss information and known risks regarding silicone breast implants. The jury also found that the AIU defendants failed to pay money due under their policies in bad faith. Following the end of trial, Judge Colombo gave his findings of fact and conclusions of law in an opinion from the bench, and then issued a written final judgment. This final judgment incorporated numerous pretrial rulings and orders, the jury's verdict, and

Judge Colombo's bench trial findings. The final judgment found in favor of Dow Corning regarding coverage of its indemnity and defense costs, and determined that Dow Corning had incurred \$216,415,529 in defense costs. The trial court found the AIU defendants liable for \$10,558,442, and then subsequently lowered that amount by \$582,000, which sum represented payments made by the AIU defendants to Dow Corning's Australian breast implant removal assistance program.

Defendants now appeal as of right from the final judgment, raising numerous issues relating to the judgment as well as decisions the trial court made before, during, and after trial. Dow Corning filed a cross appeal, also challenging several of the trial court's rulings. We affirm in part, reverse in part, and remand for further proceedings.

We cannot accurately describe the procedural background of this case without mentioning the remarkable skill and patience exhibited by Judge Colombo. In the face of some of the most expansive, complex litigation in the history of this state, Judge Colombo did not blink. He simply cut his way through a jungle of tangled law and fact, and, for the most part, reached the correct legal result with amazing accuracy. We have nothing but praise for his efforts.

Before addressing the various claims on appeal, we must point out the unique nature of this case. Insurance coverage disputes are nothing new in Michigan. Indeed, policies nearly identical to those at issue here have been construed many times. However, the underlying claims in this case are almost unprecedented. Thousands of claims have been filed alleging that breast implants cause autoimmune disease. Juries have awarded a number of women multi-million dollar verdicts based on this theory. Yet all parties to these appeals agree that breast implants cause no such injuries. Thus, we find ourselves through the looking glass, where we must allocate liability for injuries that the parties agree do not exist. To be blunt, this case is *sui generis*. The policies at issue in this case were not written in anticipation of such a scenario, and the common law of this state was not developed for application in cases of this order of magnitude or complexity. In sum, our customary judicial tools are ill-suited to the task before us.

Defendants do not raise identical issues on appeal, but many arguments do overlap. We begin by addressing the arguments raised in defendants' central brief.⁴ We will then address the separate issues raised by the AIU defendants, as well as Dow Corning's cross appeal. Finally, we will address the separate issues raised by (1) defendants Continental Casualty Company, Inc., Boston Old Colony Insurance Company, and Greenwich Insurance Company, f/k/a Harbor Insurance Company, Inc. (Harbor), (2) defendant Highlands Insurance Company (Highlands), and (3) defendant Westport Insurance Corporation (Westport).

II

DEFENDANTS' CENTRAL APPEAL

A

Trigger of coverage

On cross-motions for summary disposition brought under MCR 2.116(C)(10), the trial court accepted Dow Corning’s argument that, because the underlying plaintiffs alleged that they suffered from a progressive, continuous immune disease process beginning immediately upon breast implantation, the policies in question were “triggered” continuously from the time of implant until a claim for damages was brought against Dow Corning.

Defendants argue⁵ that the trial court erred in deciding on summary disposition that the underlying autoimmune claims triggered insurance coverage continuously beginning on the date of implant. We disagree. We review the grant or denial of a motion for summary disposition de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Our Supreme Court recently warned of the many pitfalls awaiting those who attempt to discern a distinct trigger of coverage from the standard CGL policy language. As the Court noted:

[T]he term “trigger of coverage” is not a legal doctrine to be automatically applied by a court to conclusively determine coverage in a given case. Neither is it a term found in CGL policies. Rather, as noted by the Supreme Court of California, it is a term of art used by insureds and insurers alike to

“denote the circumstances that activate the insurer’s defense and indemnity obligations under the policy. . . . ‘[T]rigger of coverage’ is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the *potential* of coverage to arise. The issue is largely one of timing--what must take place *within the policy’s effective dates* for the potential of coverage to be ‘triggered’? Whether coverage is ultimately established in any given case may depend on the consideration of many additional factors, including the existence of express conditions or exclusions in the particular contract of insurance under scrutiny, the availability of certain defenses that might defeat coverage, and a determination of whether the facts of the case will support a finding of coverage. *Montrose Chemical Corp of California v Admiral Ins Co*, 10 Cal 4th 645, 655, n 2; 913 P2d 878 (1995). [*Gelman Sciences, Inc v Fidelity and Casualty Co*, 456 Mich 305, 312, n 7; 572 NW2d 617 (1998).]

Gelman recognized that there are a number of competing “trigger” theories, but warned that “reference to trigger theories can be deceiving. Ultimately, it is the policy language as applied to the specific facts in a given case that determines coverage.” *Id.* at 316. The *Gelman* Court reiterated its point as follows:

[W]e think it apparent that some courts too quickly label the “trigger theory” they are supposedly applying without carefully considering the factual distinctions, or

lack thereof, between [the] exposure, injury in fact, and manifestation [theories]. Even more troubling, some courts are too hasty in applying a particular trigger without carefully considering the relevant policy language. We must not forget that the issue presented today is fundamentally a question of insurance contract interpretation. [*Id.* at 317.]

With *Gelman* as our guide, our analysis in this case begins and ends with the policy language.⁶ Here, the policies at issue provide coverage for Dow Corning's liability "caused by or arising out of each occurrence." The policies define occurrence as follows:

The term "occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

As the Court in *Gelman* held, and we think it indisputable, the plain language of this type of policy unambiguously requires actual injury during the policy period in order to trigger coverage. *Gelman, supra* at 319-320. This requirement could be labeled an "actual injury" trigger, an "injury-in-fact" trigger, or, in cases involving progressive injury, a "continuous injury-in-fact" trigger.⁷ The point is that the label applied to the trigger is irrelevant: whatever label one chooses, there is no potential coverage under the policy unless there is actual injury during the policy period.

With a clear understanding of the policy language, we need only determine when "actual injury" occurred to the underlying plaintiffs. Herein lies the problem. According to the underlying plaintiffs, they were afflicted with a progressive, continuous immune system disease process that begins upon breast implantation. However, according to all parties to these appeals, there are no actual autoimmune injuries attributable to Dow Corning or its breast implants. The trial court relied on the allegations of the underlying complaints and the resulting verdicts and settlements paid by Dow Corning and ruled that the underlying plaintiffs' injuries began on the date of implant. On appeal, defendants admit that they cannot relitigate the existence or cause of the women's injuries. Thus, defendants acknowledge that, for purposes of coverage under their policies, the underlying plaintiffs were injured by Dow Corning's breast implants. However, defendants argue that they are still free to litigate the timing of those injuries, and, therefore, that the trial court erred in granting summary disposition on the trigger issue.

Initially, defendants' argument has some appeal. The underlying plaintiffs were primarily trying to show that they were injured by Dow Corning's breast implants. Conversely, Dow Corning was attempting to establish that there was no causal link between its implants and the alleged injuries. For purposes of those underlying claims, neither the underlying plaintiffs nor Dow Corning had much incentive to try and determine the exact timing of the alleged injuries. Consequently, the verdicts or settlements in the underlying actions did not directly address this issue. In addition, defendants were not parties to the underlying actions, and in the case of the excess insurers, they apparently had no duty to

defend the underlying claims. Thus, there appears to be little reason for holding defendants to the unproved allegations of the underlying plaintiffs regarding the timing of their injuries.

However, defendants' argument unravels when we recognize that defendants' policies do not grant them any right to litigate any of the facts of the underlying action. Rather, the policies provide that defendants will indemnify Dow Corning for liability "imposed upon [Dow Corning] by law, or assumed under contract or agreement by [Dow Corning] . . . for damages . . . on account of . . . personal injuries . . . caused by or arising out of each occurrence." Nothing in this language, or in the definition of "occurrence," suggests that Dow Corning must prove an underlying plaintiff's damages, their injuries, or the timing of their injuries. Instead, Dow Corning need only show that liability was imposed against it, and that the reason for the imposition of liability satisfies the additional requirements of the policy. Put differently, when determining coverage under the policy, the proper question to ask is not whether there were personal injuries caused by an occurrence, but rather, why was liability imposed by law, or assumed under contract or agreement?⁸ Thus, if an underlying plaintiff alleges that she suffered injuries caused by a Dow Corning breast implant, and that her injuries began on the date of her breast implant and continued thereafter, and the law then imposes liability against Dow Corning, or Dow Corning settles claims on the basis of those allegations, defendants must indemnify Dow Corning based on those allegations. This conclusion is not based on a theory of *res judicata*, collateral estoppel, or law of the case. Rather, it is based on a plain reading of the policy language.

Here, defendants continue to argue that Dow Corning is required, for each underlying plaintiff, to prove when actual injury occurred. Despite their protestations to the contrary, defendants are merely attempting to relitigate the underlying breast implant claims. The opinions of defendants' experts regarding the underlying plaintiffs' claims of a progressive, continuous disease process beginning upon implantation has nothing to do with the reason for imposition of liability against Dow Corning in the underlying actions. Under these circumstances, the trial court properly concluded that, for coverage purposes, injury occurred beginning on the date of implant and progressed continuously thereafter.

B

Allocation of Damages

Because most of the alleged autoimmune injuries spanned multiple policy periods, the trial court was asked to decide how each claimant's damages should be distributed among the triggered policies. In addition, defendants argued that Dow Corning should pay a portion of the damages attributable to injuries suffered during periods when Dow Corning was uninsured or self-insured. Defendants described their proposed allocation as "pro rata allocation with policyholder participation." Dow Corning, on the other hand, argued that each of the triggered policies provided complete coverage, and therefore that "triggered" defendants were "jointly and severally" liable for the whole amount of each claim. The trial court reviewed the policies and various cases and adopted Dow Corning's approach, granting summary disposition for Dow on this issue.

As with the trigger issue above, we find that our analysis is properly focused, in the first instance, on the language of the policy. The relevant provisions in the policy provide:

The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the insured for all sums which the Insured shall be obligated to pay by reason of the liability

(a) imposed upon the Insured by law,

or

(b) assumed under contract or agreement by the Named Insured

* * *

for damages, direct or consequential and expenses, all as more fully defined by the term “ultimate net loss” on account of :-

(i) Personal injuries,

* * *

caused by or arising out of each occurrence.

This language clearly provides that defendants will pay “all sums” for which Dow Corning becomes liable, without any temporal limitation. Defendants rely on the definition of “occurrence” to support their argument that they should only be liable for injuries that actually accrued during the policy period. That definition, however, contains no such limitation. As noted above, an occurrence is defined in the policy as “an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period.” Discarding language irrelevant to the present case, the term occurrence means “a continuous exposure to conditions which unexpectedly and unintentionally results in personal injury during the policy period.” The phrase “which unexpectedly and unintentionally results in personal injury during the policy period” limits the definition of occurrence to certain exposures, but in no way limits the scope of defendants’ liability for those exposures. Indeed, another clause in the policy provides that:

[I]n the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy, The Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.

Clearly, the policy provides for indemnification for injuries occurring outside the policy period. Thus, the trial court properly concluded that defendants were liable for “all sums”⁹ relating to each “continuous exposure,” regardless of the fact that each exposure may have extended temporally outside of the policy period.¹⁰

A recent decision of this Court, *Arco Industries Corp v American Motorists Ins Co (On Second Remand)*, 232 Mich App 146; 594 NW2d 61 (1998), adopted a “time-on-the-risk” approach to allocation. As explained below, we are not persuaded by the reasoning in *Arco*, and we find *Arco* to

be factually distinguishable from the present case. The panel in *Arco* did not base its analysis on the policy language at issue. Instead, the panel suggested that time-on-the-risk allocation is a “logical corollary” to the injury-in-fact trigger of coverage. *Id.* at 162. In adopting this approach, the panel extended the Supreme Court’s holding in *Gelman*:

[*Gelman*] instructs that the policy language in this case states unequivocally that the policies apply to damage and injury that take place “during the policy period.” Consequently, we must reject any method of allocation that would require AMICO to provide coverage on a joint and several or “all sums” basis, since that method would require AMICO to indemnify Arco for damage occurring outside the policy period. [*Id.* at 163.]

The panel also looked to the drafting history of CGL policies, and concluded that the drafters only intended the policies to provide coverage for damages arising during the policy period. *Id.* at 163-164. The panel found further support for its time-on-the-risk approach in law review commentaries. *Id.* at 164-165.

We find three problems with the *Arco* panel’s approach. First, the analysis in *Arco* is not grounded in policy language, and we find no language that would support the time-on-the-risk approach. Second, the panel in *Arco* failed to distinguish between the trigger of coverage (injury during the policy period), and the scope of coverage. Finally, even if the policy language is ambiguous, we normally construe any ambiguity in an insurance contract against the drafter and in favor of the insured. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW2d 475 (1996).

There are at least two significant factual differences between *Arco* and the present case, both involving policy language. First, the policy at issue in *Arco* defined an occurrence as “an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” While this language is similar to that at issue here, it limits an occurrence to “accidents.” The plain meaning of the term “accident” suggests an event of limited duration. The policy language at issue here, on the other hand, is not limited to “accidents.” In fact, the definition of occurrence in this case expressly includes “a continuous or repeated exposure.” At least one court has found this “continuous or repeated exposure” language to be significant. See *American Nat’l Fire Ins v B & L Trucking*, 951 P2d 250, 255 (Wash, 1998). As noted in *B & L Trucking*, this language contemplates an “occurrence” taking place over a period of time, i.e., beginning before or ending after the policy period. *Id.*, n 5.

Second, as noted above, the policy at issue in our case expressly addresses injuries that extend outside the policy period:

[I]n the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy, The Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.

The panel in *Arco* did not cite any such provision, and it was presumably absent from the policy at issue in that case. While “time-on-the-risk” allocation may have been a “logical corollary” to the language at issue in *Arco*, it would be an illogical corollary here.

Pursuant to *Gelman*, we must base our analysis on the language of the policy. *Gelman, supra* at 316, 317. Because we read the policy language at issue here as requiring defendants to pay “all sums,” and because the panel in *Arco* was construing different language, we decline to extend *Arco* to the present case. The trial court correctly held that, under the relevant policy language, defendants are liable for “all sums.”

C

Allocation of Defense Costs

Next, defendants briefly argue that defense costs should also be allocated using “pro rata allocation with policyholder participation.” As stated, we reject any such approach because it does not comport with the “all sums” policy language.

D

Exhaustion of Coverage

Defendants also maintain that excess insurers should not have to pay until all triggered primary and lower-level excess policies have been exhausted. As an example, if a particular claimant suffered injuries continuously between 1970 and 1980, defendants argue that no excess insurer should be liable for that claim until all primary policies with policy periods between 1970 and 1980 are exhausted. The parties and other courts have named this method “horizontal exhaustion.” On the other hand, Dow Corning argues that an excess insurer becomes potentially liable as soon as the policies “directly below” (i.e., in the same policy period) are exhausted. This method has been termed “vertical exhaustion.” The trial court agreed with Dow Corning and, relying on cases from other jurisdictions,¹¹ stated that “[t]he ‘other insurance’ clause can only be reasonably interpreted to mean that other insurance must pay first *if it provides coverage in the same policy period.*” [Emphasis added.]

For their part, defendants rely on the “other insurance” clause in their policies, which states:

If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

This language clearly supports defendants’ argument, since any triggered primary or lower-level excess policies constitute “other valid and collectible insurance . . . covering a loss also covered by this policy.”

Dow Corning argues that, in fact, all primary insurance has already been exhausted, and that “the only issue on appeal is whether there is any requirement that Dow Corning must exhaust all of the excess policies that provide coverage for a claim before it can obtain coverage from an excess policy that contains an ‘excess’ other insurance clause.” Dow Corning oversimplifies the issue somewhat. Each defendant excess insurer holds a unique place in Dow Corning’s insurance array. That is, no two insurers cover the same level of excess during the same policy period.¹² In addition, Dow Corning had many levels of excess insurance, such that most excess insurers were not obligated to provide coverage until primary policies *and* other, lower-level excess policies had been exhausted. The “other insurance” clause is consistent with this system of coverage. As noted above, that clause exempts “insurance that is in excess of the insurance afforded by this policy.” Thus, the “other insurance” clause, by its own terms, does not apply to higher-level excess insurance policies. Clearly, the “other insurance” clause *does* apply to lower-level excess policies. Because the question whether, and how, this clause applies to excess policies at the same level is not quite so easily resolved, we will address it below.

In its argument on appeal, Dow Corning ignores higher-level and lower-level excess policies, and simply points out the problems of applying the “other insurance” clause to excess insurers at the same level. Dow Corning suggests that, if the “other insurance” clause in every contract is applied as written, Dow Corning could never recover from any of its excess policies. This would obviously be an absurd result. See *St Paul Fire & Marine Ins Co v American Home Assur Co*, 444 Mich 560, 577-578; 514 NW2d 113 (1994). However, Dow Corning’s argument regarding competing excess “other insurance” clauses in policies at the same level, or layer, of coverage, has already been resolved by this Court. Where identical “other insurance” clauses cannot be reconciled, they are not read to preclude coverage altogether. Instead, we must apportion coverage between the policies in a reasonably equitable manner. *Pioneer State Mutual Ins Co v TIG Ins Co*, 229 Mich App 406, 414; 581 NW2d 802 (1998). Thus, the plain language of the “other insurance” clause in each of the policies requires that all underlying primary and lower-level excess insurance policies be exhausted before coverage becomes available. Absent some ambiguity, we are bound by the plain language of the contract. To the extent that any triggered policies at the same level contain mutually repugnant “other insurance” clauses, those insurers must share liability equitably. *Id.*¹³

Because the plain language of the “other insurance” clause is clear on its face, the only way an ambiguity could arise is if some other language in the insurance contract conflicts with that clause. On this point, Dow Corning suggests that the policies at issue contained a “schedule of underlying insurance,” which lists all policies that must be exhausted before the excess insurer becomes liable. Dow Corning argues that defendants cannot require exhaustion of any policy not listed in this schedule. The language cited by Dow Corning appears in the “Limit of Liability” section of the policy, and provides that:

The Company shall only be liable for the ultimate net loss the excess of . . .

(a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances.

The fundamental problem with Dow Corning's argument is that nothing in this "limit of liability" section conflicts with the "other insurance" clause. In other words, both parts of the policy can be given full effect without violating the plain language of either. Under these circumstances, we must enforce the "other insurance" clause as written. Because the trial court's adoption of "vertical exhaustion" violates the plain language of the "other insurance" clause, we must reverse on this point.

E

Autoimmune v Nonautoimmune Claims

Defendants next argue that the trial court erred in refusing to separate autoimmune-injury claims from nonautoimmune-injury claims, and in refusing to allow the jury to decide issues specific to nonautoimmune injuries. We disagree.

As with their trigger argument, defendants' position has some initial appeal. Defendants point out that nonautoimmune injuries would seem to require separate analysis regarding the "trigger of coverage" and the allocation of damages. Those claims also present a distinct question regarding whether Dow Corning "expected or intended" those injuries. The problem with defendants' argument is that they neglect to point out the timing of their objections in the trial court, and they fail to recognize the context in which the trial court made its rulings. Viewed in context, the trial court's rulings were proper.

Defendants do not deny that this case involves thousands of underlying claims, nor do they deny that Dow Corning attempted to settle those claims systematically, rather than case-by-case. Further, defendants acknowledge that, in the 1990's, the number of lawsuits against Dow Corning "multiplied rapidly" and "these lawsuits often included claims that breast implants cause autoimmune diseases of various kinds." According to defendants, this explosion of litigation happened "for a variety of reasons," though defendants never suggest what those reasons might be. Defendants then go on to assert that nonautoimmune injuries represent a significant part of this litigation.

In making this argument, defendants asked the trial court to check its common sense at the door and imagine that, after decades when only a small number of minor nonautoimmune-injury claims were filed, the same type of claims suddenly exploded into billions of dollars of litigation. This was simply not the case, and the trial court was not required to play dumb, and forget everything it knew about this litigation. In fact, the flood of litigation that spawned these appeals began after a few women with breast implants successfully sued Dow Corning on the novel theory that their breast implants caused various autoimmune symptoms and diseases. As the trial court well knew, those autoimmune injury claims are what caused almost all of the underlying litigation.

Ignoring the above circumstances, defendants now contend that the trial court should have segregated the autoimmune claims from the nonautoimmune claims. Defendants fail to point to any evidence that they requested such a segregation before trial. Instead, defendants waited until trial had commenced, and then attempted to divert attention from the true focus of the case – the autoimmune-injury claims – by arguing that many of the plaintiffs also alleged nonautoimmune injuries.

With regard to claims that involved both autoimmune and nonautoimmune injuries, defendants were attempting to relitigate those claims. As noted above, defendants were not entitled to relitigate the underlying claims. In addition, once those claims were tried or settled, there was no way the autoimmune and nonautoimmune injuries could be segregated.¹⁴ With regard to claims involving solely nonautoimmune injuries, the trial court acknowledged that such claims might warrant separate analysis. However, with as many as 20,000 underlying claims, and with trial already under way, defendants put the trial court in a difficult position: how could the court determine whether any claims involving solely nonautoimmune injuries existed? Here, the trial court exercised common sense; because the court knew that almost all (if not all) of the underlying claims alleged autoimmune injuries, and because the parties, at least up to that point, had appeared to operate on the assumption that all of the claims alleged autoimmune injuries,¹⁵ the trial court asked defendants to come forward with evidence that any of the underlying claims at issue alleged solely nonautoimmune injuries. Defendants did not, and have not, provided evidence of such claims. Even if defendants had been able to show that such claims existed, the solution would not have been to allow defendants to confuse the jury with extended discussion of those few claims. Instead, the trial court would likely have segregated those claims. When defendants failed to show that any such claims existed, there was nothing to segregate. As our Supreme Court has noted, courts are not required to make parties attempt the impossible, *Gelman, supra* at 326, n 12, nor must the court itself do the impossible. Here, in the midst of trial, it would have been nearly impossible, as a practical matter, for the court or Dow Corning affirmatively to show that none of the underlying complaints alleged solely nonautoimmune injuries. Under these circumstances, the court properly required defendants to make an initial showing that there were claims alleging solely nonautoimmune injuries. Because defendants failed to make such a showing, the trial court properly treated all claims as involving allegations of autoimmune injuries.

F

Defendant's Subrogation Rights

Defendants next contend that Dow Corning adversely affected their subrogation rights when it amended and later terminated a provision in its policy with primary insurer Zurich-American Insurance Company that, according to defendants, provided for automatic reinstatement of the policy once claims reached policy limits. Defendants claim that these actions had the effect of increasing defendants' exposure under their excess policies. We decline to address this issue because defendants have failed to cite any authority to support their novel argument that Dow Corning's actions somehow prejudiced defendants' subrogation rights in violation of their policies. *Winiemko v Valenti*, 203 Mich App 411, 415; 513 NW2d 181 (1994).

G

Dow Corning's Global Settlement Payment as a Covered Indemnity Cost

Next, defendants argue that the trial court erred in ruling after the bench trial that Dow Corning's \$42.5 million payment to the global settlement fund was a covered indemnity cost. Defendants contend that the payment was purely administrative in nature, did not compensate victims, and was not a covered cost, but was voluntarily paid by Dow Corning. We find no merit to this claim.

A trial court's findings of fact in a bench trial are reviewed for clear error. MCR 2.613(C). Interpretation of unambiguous contract language is a question of law that we review de novo. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 419; 546 NW2d 648 (1996).

The relevant policies, as typified by the Home Insurance Company Policy, provide coverage for "ultimate net loss," defined as the "total sum which the insured . . . become[s] obligated to pay by reason of personal injury . . . claims, either through adjudication or compromise . . . and for . . . settlement . . . of claims and suits which are paid as a consequence of any occurrence covered hereunder." It was undisputed that Dow Corning's initial \$42.5 million payment into the global settlement fund would be used to pay costs of administering the settlement and to make emergency indemnification payments to individual claimants. Therefore, the \$42.5 million payment is encompassed within the "ultimate net loss" provision by its plain and unambiguous terms. Clearly, the provision does not limit coverage only to those costs that directly indemnify. Moreover, there is no basis for defendants' attempt to characterize the payment as voluntary merely because it was the result of a negotiated settlement. Thus, the trial court did not err in determining that the payment is a covered indemnity cost.

H

Conditional Dismissal of Defendants' Cross-Claims

Defendants next argue that the trial court erred in dismissing defendants' cross-claims with the condition that any future contribution action be litigated before the trial court. Defendants essentially contend that courts do not have the authority to preclude litigants from bringing actions in other state courts or in federal court. We believe that defendants mischaracterize the nature of the trial court's ruling. Pursuant to MCR 2.504(A)(2), the trial court conditioned the *voluntary* dismissal of defendants' cross-claims without prejudice upon the limitation that they could not litigate contribution claims in other fora. The choice whether to accept the condition was with defendants. *Mleczko v Stan's Trucking, Inc*, 193 Mich App 154, 156; 484 NW2d 5 (1992). Defendants accepted the condition and therefore waived any objection. See 3 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.504, p 51.

I

Denial of Defendants' Motion for Mistrial

Finally, defendants argue that the trial court should have granted defendants' motion for a mistrial when Dow Corning issued a press release concerning a proposed settlement with defendants Granite State Insurance Company, Commercial Insurance Company of Newark, N.J., and The Insurance Company of the State of Pennsylvania. Defendants claim that the fact that some of the jurors saw the related news article created prejudice requiring a new trial. We review for an abuse of discretion a trial court's decision on a motion for a mistrial. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

At the parties' request, the trial court polled the jurors regarding the article, ascertained whether such exposure would affect their ability to decide the case fairly, removed one juror who said it would, and cautioned the jury pursuant to an instruction the parties agreed upon. We are not persuaded that defendants were prejudiced by the jury's exposure to the settlement information and therefore cannot say that the trial court abused its discretion in declining to declare a mistrial. See *People v Grove*, 455 Mich 439, 475-476; 566 NW2d 547 (1997).

III

SEPARATE APPEAL OF THE AIU DEFENDANTS

A

Directed Verdict - Duty to Defend

In Docket No. 200153, the AIU defendants first argue that the trial court erred in directing a verdict in favor of Dow Corning on Dow Corning's claim that the AIU defendants breached their contractual duty to defend. The AIU defendants maintain that Dow Corning never tendered the defense of foreign claims filed in the United States as required by the AIU policies but instead retained control over the litigation and settlement of those claims. In reviewing a trial court's ruling on a motion for directed verdict, we must examine the evidence presented in a light most favorable to the nonmoving party and determine whether there was an issue of fact for the jury. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

Under Michigan law, an insurer has no duty to defend an insured absent a request to do so. *Celina Mutual Ins Co v Citizens Ins Co of America*, 133 Mich App 655, 662; 349 NW2d 547 (1984); *DAIIE v Higginbotham*, 95 Mich App 213, 218; 290 NW2d 414 (1980). In this case, the controlling language of the AIU policies provides only that, in order for the AIU defendants to handle and settle claims, those claims "must be reported." As the trial court noted, there was undisputed evidence that the AIU defendants were informed of the pending implant lawsuits and knew that Dow Corning desired their assistance in defending against those claims. Indeed, Dow Corning sent the AIU defendants copies of complaints filed by foreign plaintiffs when received, along with letters which notified the AIU defendants of the claims and requested the AIU defendants' assistance with the defense. Even viewing the evidence in a light most favorable to the AIU defendants, because the policies prescribe no particular form of "tender," the trial court properly granted Dow Corning's motion for a directed verdict.

B

Unfair Surprise/Lack of Evidence - Dow Corning's Breach of Contract Claim

The AIU defendants next contend that Dow Corning should not have been permitted to assert its breach of contract claim at trial because the AIU defendants were unfairly surprised and prejudiced by the late addition of this claim against them. This argument lacks merit. Dow Corning's first amended complaint filed on October 28, 1994, placed the AIU defendants on notice that they were being sued

for breach of contract and that Dow Corning was seeking to recover the AIU defendants' share of defense, indemnity, and global settlement costs as damages. AIU policies are listed by number, and Dow Corning alleged the amount of payments it had made to that point, including the \$42.5 million global settlement payment. Any failure on the part of the AIU defendants to discover more fully the extent of the damages Dow Corning was claiming cannot be set up as a basis for a claim that the AIU defendants were somehow "ambushed" by Dow Corning's breach of contract claim.

In a related argument, the AIU defendants maintain that the trial court should have granted their motion for judgment notwithstanding the verdict as to the generic defense costs, the global settlement costs, and the other case specific defense and indemnity costs claimed because Dow Corning failed to provide any evidence that those costs had been submitted for payment to and refused by the AIU defendants. We disagree. In reviewing a motion for judgment notwithstanding the verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 696; 513 NW2d 230 (1994). "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Id.* Based on the evidence presented at trial, reasonable jurors could have concluded that, in light of the AIU defendants' actions in response to Dow Corning's requests for assistance in defending the underlying breast implant claims and to Dow Corning's submission of various bills representing costs incurred by it in the course of defending, settling, and paying judgments rendered on those claims, continued submission of such bills would have been futile. As the trial court stated:

The evidence at trial demonstrated some bills, although phenomenal amounts were not paid. It also became very apparent when you heard the AIU representatives; that they were not going to pay the bills. It didn't matter what was out there. Whatever was submitted, there would always be another question, there would always be another issue raised. And they were not going to pay, until the Court ordered them to pay. And that's what the jury concluded and that's what the evidence showed.

Because there was ample evidence to support the jury's verdict, the trial court did not err in denying the AIU defendants' motion for judgment notwithstanding the verdict.

C

Prejudgment Interest

Next, the AIU defendants argue that the trial court erred in calculating prejudgment interest under MCL 600.6013(5); MSA 27A.6013(5). The AIU defendants contend that §6013(5) does not apply because insurance contracts are not "written instruments" as contemplated by that provision. However, this issue has already been resolved, adversely to the AIU defendants' position, by our Supreme Court in *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998).

D

Interest under the Uniform Trade Practices Act

The AIU defendants next argue that they are entitled to judgment notwithstanding the verdict “on the alleged violation of [Uniform Trade Practices Act, MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.* (UTPA)].” Essentially, the AIU defendants contend that they cannot be held liable for penalty interest for violating MCL 500.2006(4); MSA 24.12006(4) “because the only two bills submitted to it were reasonably in dispute.” However, despite the AIU defendants’ claim that they properly raised this issue at trial “by objecting to the jury’s being instructed on the UTPA penalty interest provision,” it is manifest that the AIU defendants did not object below on the same ground that they now assert on appeal. Accordingly, we consider this issue abandoned and decline to address it. See *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992).

E

Dow Corning’s RAP Payments - “Ultimate Net Loss”

The AIU defendants’ final argument on appeal is that the trial court erred in ruling that payments the AIU defendants made under Dow Corning’s Australian removal assistance program (RAP) did not fall within the AIU policies’ definition of “ultimate net loss” and, therefore, that those payments did not count toward exhausting the AIU policy limits. This issue is moot because the trial court amended the final judgment, crediting the AIU defendants for \$582,000, which sum represented the RAP payments made by them. See *People v Greenburg*, 176 Mich App 296, 302; 439 NW2d 336 (1989).

IV

DOW CORNING’S CROSS APPEAL

A

Breach of Contract Claims Against Excess Insurers

In its cross appeal in Docket Nos. 200143-200154, Dow Corning argues that the trial court erred in striking from the pretrial order Dow Corning’s claim for money damages made against certain higher-level excess insurers, and that the court abused its discretion in denying Dow Corning’s request to amend its complaint to add, in addition to Dow Corning’s original request for declaratory relief, a breach of contract claim against those insurers. These arguments lack merit.

We first reject as unfounded Dow Corning’s argument that the trial court erred in striking from the pretrial order the money damage claims asserted against the higher-level excess insurers. Although Dow Corning argues that its *anticipatory* breach of contract claim was sufficient to justify a trial on the issue whether Dow Corning was entitled to breach of contract damages from the higher-level excess insurers, Dow Corning cites no authority to support its argument, and we therefore decline to address it. *Winiemko, supra*. Moreover, while Dow Corning correctly states that a court may, under certain circumstances, award money damages in addition to declaratory relief even though money damages were not demanded in the complaint, see, e.g., *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997); *Foremost Life Ins Co v Waters (On Remand)*, 125 Mich App 799, 802; 337 NW2d 29 (1983), this general rule does not support Dow Corning’s position. Unlike *Durant* and *Foremost*, this

is not a case in which the defendant's liability has been declared and the only remaining issue involves what relief is appropriate. To the contrary, at the time Dow Corning submitted its proposed pretrial order, the higher-level excess insurers' liability had not yet been established.

Nor can we say that the trial court abused its discretion in denying Dow Corning's motion to amend its complaint brought one month before trial. Unquestionably, the amendment would have added enormous complexity to an already complex jury trial. Trying a breach of contract claim against the higher-level excess insurers would have required a determination of which primary and lower-level excess policies had to be exhausted and when, if ever, they were in fact exhausted. This determination, in turn, would depend on how defense and indemnity costs were allocated among the primary and lower-level excess policies.

Finally, given that the claims for money damages asserted against the higher-level excess insurers properly were stricken from the pretrial order, and Dow Corning's motion to amend was denied, we find no merit in Dow Corning's claim that the breach of contract claims were tried by express or implied consent. Indeed, the evidence submitted by Dow Corning at the bench trial (concerning the defense and indemnity costs incurred) was related to the exhaustion issue, not to the higher-level excess insurers' potential liability for breach of contract.

B

Calculation of Prejudgment Interest

Dow Corning next contends that the trial court erred in refusing to calculate prejudgment interest from either the date that Dow Corning filed its first amended complaint and alleged a breach of contract claim against the AIU defendants or from the date it incurred specific defense and indemnity costs. The court ruled that Dow Corning was only entitled to prejudgment interest from the date when the AIU defendants were presented with bills and refused to pay. We find no error.

When, as here, an insurer fails to pay claims arising after the complaint, prejudgment interest is payable from the postcomplaint date on which the insurer refused to pay. *Beach v State Farm Auto Ins Co*, 216 Mich App 612, 624; 550 NW2d 580 (1996). Because Dow Corning admittedly did not submit bills to the AIU defendants (which we have already concluded does not preclude Dow Corning from recovering the costs associated with those bills), it is not entitled to prejudgment interest dating back to the filing of the first amended complaint or to the date that Dow Corning incurred costs.

C

Dow Corning's Request for Attorney Fees

Dow Corning's last argument in its cross appeal is that the trial court erred in denying Dow Corning's request for attorney fees. This claim is without merit. Michigan follows the "American rule," and attorney fees are not recoverable unless a statute or court rule authorizes them. *McAuley v General Motors Corp*, 457 Mich 513, 519; 578 NW2d 282 (1998). Dow Corning essentially admits that there is not statutory or court rule basis for attorney fees here.

Moreover, the “ultimate net loss” language¹⁶ of the relevant policies only authorizes reimbursement for the payment of attorney fees associated with litigation of underlying claims arising under the policies. It does not authorize recovery of attorney fees in a dispute over coverage between the insured and the insurer.

V

DEFENDANT HARBOR’S SEPARATE APPEAL

In Docket No. 200143, Harbor argues that the trial court erred in denying Harbor’s motion for a directed verdict on its innocent misrepresentation defense to Dow Corning’s claim seeking coverage. We disagree. Under Michigan law, an innocent misrepresentation claim requires reliance on a material misrepresentation. *M & D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Viewing the evidence in a light most favorable to Dow Corning, there was a question of fact concerning whether Dow Corning’s failure to include certain loss information on its 1984-1985 insurance application was material and whether Harbor relied on that misrepresentation. Accordingly, the trial court properly denied Harbor’s motion for a directed verdict. See *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 529; 529 NW2d 318 (1995).

VI

DEFENDANT HIGHLANDS’ SEPARATE APPEAL

In Docket No. 200144, Highlands argues that the trial court erred in denying Highlands’ motion for entry of an order declaring that the underlying breast implant claims asserted against Dow Corning arise out of a single occurrence. Such a determination would have benefited Highlands because its policy limited coverage to \$500,000 per occurrence. Upon our de novo review of the unambiguous policy language, *Lozanis, supra*, we find no error in the trial court’s decision.

The Highlands policy contains the following definition of occurrence:

The term “occurrence” wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

Highlands contends that the majority of courts construing similar language have held that multiple claims arising out of exposure to a product can be said to result from a single occurrence. Highlands suggests that the “occurrence” is the manufacture or sale of the defective product. However, we see no basis in the policy language for construing the terms “accident,” “event,” or “happening” necessarily to mean the manufacture and sale of breast implants. We agree with Dow Corning that a more natural reading of the policy is that each implantation represents a separate accident, event, or happening.

Moreover, while the underlying claimants' injuries might reasonably be said to result from exposure to breast implants, whether breast implants can be considered "general conditions" that are "substantially the same" for all underlying claimants is highly questionable. For sure, the various claimants' breast implants cannot reasonably be characterized as "general conditions existing at or emanating from one premises location." At the time of exposure, the implants certainly were not existing at the same premises location, and, moreover, we note that Dow Corning produced numerous breast implant products, including silicone gel for use in breast implants produced by other manufacturers. At the very least, the policy language is ambiguous, and, therefore, consistent with Michigan law, should be construed in favor of the insured. *Gelman, supra* at 318. The trial court did not err in determining that each exposure to breast implants constituted a separate occurrence under the policy.

Highlands next argues that, *if* this Court reverses the trial court's decision denying Dow Corning's request for attorney fees, then any such award should be offset by Highlands' fees incurred in defending against an allegedly frivolous claim made by Dow Corning. Because we affirm the trial court's decision denying Dow Corning's request for attorney fees, there is no need to address this issue.

VII

DEFENDANT WESTPORT'S SEPARATE APPEAL

In Docket No. 200149, defendant Westport Insurance Corporation (Westport) argues that the trial court erred in denying Westport's motion for either judgment notwithstanding the verdict or a new trial on its fraud and misrepresentation defense to Dow Corning's claim seeking coverage. This claim lacks merit.

As we stated previously, "[i]f reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury" and a motion for judgment notwithstanding the verdict is properly denied. *Thorin, supra* at 696. A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. *Bosak v Hutchinson*, 422 Mich 712, 737; 375 NW2d 333 (1985). However, the jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). We review for an abuse of discretion a trial court's decision granting or denying a motion for a new trial. *Bosak, supra*.

Westport claims that the evidence showed that Dow Corning was aware that its breast implants leaked silicone gel into the surrounding tissue but concealed the problem from its insurers. While there was some evidence that Dow Corning knew of localized complications due to implantation, and that defense expert underwriters Lee Redding and William Baccala would not, in hindsight, have written policies for Dow Corning had such information been provided, Baccala also testified that Dow Corning fully disclosed all relevant product information that would ordinarily be requested on an insurance application, including loss information, and that insurers had the opportunity to request additional information regarding product testing. The jury considered the competing evidence and found in favor of Dow Corning, and we see no basis for overturning that verdict. Therefore, the trial court properly denied Westport's motion for judgment notwithstanding the verdict and/or a new trial.

VIII

CONCLUSION

For the reasons set forth above, we affirm the decision of the trial court in all respects except as to the method for exhausting coverage. We reverse the trial court's application of "vertical exhaustion" and instead remand for application of "horizontal exhaustion." We do not retain jurisdiction.

Affirmed in part, reversed in part, and remanded for further proceedings.

/s/ Robert P. Young, Jr.

/s/ William B. Murphy

/s/ Joel P. Hoekstra

¹ All references to "Dow Corning" include both the Dow Corning Corporation and Dow Corning Wright Corporation.

² The insurance industry apparently offered "occurrence" policies until 1985. At that time insurers switched to "claims-made" policies, which provided coverage for claims actually made against the insured during the policy period. There are no claims-made policies at issue in these appeals.

³ The parties agreed that the defense and indemnity costs should be determined by the court rather than the jury.

⁴ The term "central brief" refers to the brief signed by all defendants raising those issues common to all defendants.

⁵ Not all defendants joined in all parts of the central brief trigger argument. As stated in the their central brief:

Home Insurance Company does not join in Argument I. American Manufacturers and Lumbermans do not join in Argument I(C)(1). The AIU Foreign Primary Insurers join in Argument I with the understanding that manifestation should have been applied because the controlling law so dictated, taking no position as to whether that trigger is most compatible with the language of the policy. Home, American Manufacturers, Lumbermans, and the AIU Foreign Primary Insurers do agree that the trial court erred by granting summary disposition on trigger of coverage for autoimmune injury claims.

⁶ All parties relied on language found in defendant Home Insurance Company's policy, introduced below as Plaintiff's Exhibit 63. At oral argument, this Court asked all parties whether the Court could properly rely on that policy, and all parties agreed that it could. Thus, unless otherwise stated, any policy language quoted in this opinion comes from that policy, and that language is binding on all parties.

⁷ As the Court in *Gelman* noted, the "injury-in-fact" and "continuous" labels will often be interchangeable. *Gelman, supra* at 314, n 8.

⁸ Stated otherwise, the question in this insurance dispute is not “what really happened?” Instead, the question is, “what did a judge or jury believe happened, or what did Dow Corning fear a judge or jury might believe happened?”

⁹ The trial court labeled this allocation “joint and several liability.” While other courts have used this label, see *Keene Corp v Ins Co of North America*, 215 US App DC 156; 667 F2d 1034 (1981), we note that “joint and several liability” is a term taken from tort law, rather than contract law. We see no reason to add any additional labels to “all sums” liability.

¹⁰ We note that defendants could easily have limited their coverage to injuries occurring within the policy period by simply so stating in the coverage section of their policies.

¹¹ See *Dayton Ind Sch Dist v National Gypsum Co*, 682 F Supp 1403 (ED Tex, 1988), rev’d on other grounds sub nom *W R Grace & Co v Continental Casualty Co*, 896 F2d 885 (CA 5, 1990); *Associated Int’l Ins Co v St Paul Fire & Marine Ins Co*, 220 Cal App 3d 692; 269 Cal Rep 485 (1990).

¹² Dow Corning had no reason to purchase overlapping policies, and there is no evidence that they did so.

¹³ Policies at the same level that lack an “other insurance” clause would have to pay first. See generally *St Paul Fire & Marine Ins Co*, *supra* at 569-570. However, the parties seem to agree that all policies at issue in this case contain substantially identical excess “other insurance” clauses. The court in *Pioneer* indicated that an equitable division simply means that each insurer pays a proportionate share of the total costs based on its policy limits. *Pioneer State Mut Ins Co*, *supra* at 416.

¹⁴ Even if the claims had not been tried or settled, there was still no practical way to segregate 20,000 mixed claims.

¹⁵ Indeed, several defendants joined in a motion for summary disposition on the “trigger” issue admitting that “this case does not involve the first two phenomena: the occurrence of a typical foreign body reaction, and the subsequent occurrence of localized reactions (granular formation and capsular contracture). . . . What this case does involve is a third phenomenon - the alleged occurrence of autoimmune and other systemic illnesses in some breast implant recipients.” Lest there be any doubt, the same brief refers back to the same three phenomena, and assured the trial judge that “[t]he first two need not concern the Court.”

¹⁶ Both parties cite the following definition of “ultimate net loss” contained in the Home Insurance Company policy:

The term “Ultimate net loss” shall mean the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or

compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees.