NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

PREPARED AND FILED BY THE COURT

ATLANTIC CASUALTY INSURANCE COMPANY,

Plaintiff,

v.

REMTEK SERVICES, INC., THE SIENA CONDOMINIUM ASSOCIATION, INC., HEROD URBAN RENEWAL, LLC, HEROD REDEVELOPMENT I, LLC, HEROD MEZZ, LLC, PINNACLE INVESTMENT VENTURES, LLC, THE PINNACLE COMPANIES, LLC, KOHL PARTNERS, LLC, BRIAM M. STOLAR, JOHNATHAN LITT, ALAN LITT, THOMAS MORGAN, HOWARD IRWIN, MICHAEL CANTOR, ESTATE OF LEONARD KOHL, DREW BARILE, SR., NATHAN MANDELBAUM, and J.H. MACK, LLC,

Defendants.

REMTEK SERVICES, INC.

Defendant/Third-Party Plaintiff,

v.

KNIGHT INSURANCE AGENCY, INC., TERRY JOYCE, HUB INTERNATIONAL NORTHEAST LTD., HUB INTERNATIONAL PENNSYLVANIA LLC and/or HUB INTERNATIONAL OF ILLINOIS INC., and TRI-STATE GENERAL INSURANCE AGENCY, LTD.,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION: CIVIL PART

Docket No.: L-3684-14

Consolidated with Major Case
Docket No.: L-1445-09

Civil Action

MEMORANDUM OPINION

For Plaintiff Atlantic Casualty Insurance Co.: Debra M. Krebs (argued and on the brief), Keidel, Weldon & Cunningham, LLP

For Defendant Remtek Services, Inc.: Mark R. Sander (argued and on the brief), Thomas, Thomas & Hafer, LLP

For Defendants Herod Urban Renewal LLC, Herod Redevelopment I LLC, Herod Mezz, LLC, The Pinnacle Companies, LLC and Brian Stolar: Christopher P. Gengaro (argued and on the brief), Lentz & Gengaro LLP

For Third-Party Defendant Tri-State General Insurance Agency, Ltd.: Douglas E. Motzenbacker (argued and on the brief), Gordon & Rees Scully Mansukhani LLP

Decided: January 28, 2019

HON. KEITH E. LYNOTT, J.S.C.

In this declaratory judgment action, the Plaintiff insurer Atlantic Casualty Insurance Company ("Atlantic") seeks summary judgment determining that its general liability insurance policy No. L009005513 (the "Policy") sold to its insured, Remtek Services, Inc. ("Remtek"), does not afford coverage for any liability of Remtek associated with the lawsuit in respect of which Remtek seeks coverage. As part of that motion, Atlantic seeks reconsideration of the Court's prior denial of summary judgment to Atlantic and of the Court's grant of partial summary judgment to Remtek as to the duty of Atlantic to defend under the Policy and as to Remtek's bad-faith claim. Atlantic also seeks to sever any trial of the coverage issues raised in the declaratory judgment action from the trial as to Remtek's third-party claims against its insurance broker, Knight Insurance Agency, Inc. ("Knight"), and Tri-State General Insurance Agency, Ltd. ("Tri-State"), a wholesale broker involved in procuring the Policy.

Tri-State moves for summary judgment on the remaining claim asserted against it. That claim alleges fraud by Tri-State in connection with the procurement of the Policy. Tri-State seeks either a determination that the Court previously erred in denying summary judgment as to this

claim or that additional evidence adduced since the Court's prior ruling now warrants dismissal of the claim.

For the reasons set forth herein, the Court denies Atlantic's motion for summary judgment and reconsideration. It grants Atlantic's motion for severance. It grants Tri-State's motion for summary judgment as to the fraud claim asserted against it.

I

The procedural history of this matter is of relevance to the Court's examination of the motion. Accordingly, the Court rehearses pertinent details of that history.

This action arises from a litigation (the "Underlying Action") initiated by The Siena Condominium Association, Inc. ("Siena") against Herod Urban Renewal, LLC (together with affiliates, "Herod"), the owner/developer of a residential condominium complex located in Montclair and known as The Siena. Siena alleges a variety of defects in the design and construction of the complex, including defects in the installation of the roofing. Herod, in turn, filed a Third-Party Complaint against numerous contractors and sub-contractors, including Remtek.

Remtek installed the main roof on the building, as well as the roofing on a lower floor and elsewhere at the building. Expert reports submitted by various parties, including the Plaintiff, aver that improper installation of certain portions the roofing, including the main roof, has contributed, along with other defects, to water infiltration and resulting property damage.

Atlantic issued the Policy to Remtek, effective August 1, 2007. Knight was the retail broker that advised and assisted Remtek in the placement of this Policy. Knight procured the coverage through Tri-State, a wholesale broker and general agent for Atlantic.

Atlantic cancelled the Policy effective December 24, 2007, asserting that an inspection of the then ongoing roofing work revealed that Remtek was installing a type of roof—namely, a sprayed-on polyurethane roof—that Atlantic does not underwrite and as to which its Policy excluded coverage. When confronted with the Third-Party Complaint in the Underlying Action, Remtek submitted a claim to Atlantic under the Policy, seeking defense and indemnity cover. Atlantic responded by filing this action seeking a determination that it is not obligated under the Policy to afford any coverage. Remtek, in turn, filed a Third-Party Complaint in this case against Knight and Tri-State (among others) contending that these brokers committed professional negligence and fraud in the procurement of the insurance.

The Court (Mitterhoff, J.S.C.) issued rulings that are the subject of motions for reconsideration by Atlantic and Tri-State, respectively. In particular, Judge Mitterhoff denied summary judgment to Atlantic predicated on a Roofing Limitation Endorsement (the "RLE") set forth in an Endorsement to the Policy. As discussed in detail below, Judge Mitterhoff held the exclusion was not applicable to certain aspects of the roofing work performed by Remtek, including the installation of flashings and the coping of the parapets, as such did not involve the roofing materials covered by the exclusion. As the expert reports assert improper installation of flashings and sealant in connection with the parapet copings, Judge Mitterhoff held the exclusion did not vitiate the coverage of the Policy altogether. Instead, she determined the Policy could apply to certain of the work performed by Remtek that has, in turn, been causally linked to the alleged property damage.

She also determined that Atlantic had not established the absence of a covered "occurrence" as a matter of law. Applying the continuous-trigger theory of coverage, as mandated by Air Master & Cooling, Inc. v. Selective Insurance Co. of America, 452 N.J. Super.

35 (App. Div. 2017) ("Air Master")—a case involving this same residential complex and Underlying Action and in which the Appellate Division reversed Judge Mitterhoff's prior ruling—she determined that covered property damage could have occurred during the time the Policy was in force.

Judge Mitterhoff also granted Remtek's motion requiring Atlantic to afford Remtek a defense to the Underlying Action. She determined the claims asserted in that action potentially come within the ambit of coverage of the Policy. She also determined there is no reasonable basis on which to apportion defense costs among covered and non-covered claims, and accordingly, that Atlantic must afford a complete defense.

As to Tri-State, Judge Mitterhoff, in a series of rulings, dismissed all the claims asserted against it, save for the claim asserting fraud. As to the latter claim, she determined that a genuine dispute of material fact existed as to whether Tri-State submitted a fraudulent application to Atlantic, resulting in its action to cancel the Policy as of December 24, 2017, precluding summary judgment.

II

Turning first to the motion to reconsider Judge Mitterhoff's ruling on the applicability vel non of the RLE, the applicable standard is set forth in Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). Quoting with approval from D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990), the court stated:

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of, probative, competent evidence. . . .
>
> Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of

> justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.
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> [295 N.J. Super. at 384.]

In D'Atria, 242 N.J. Super. at 401, the court expressed the standard as follows:

> Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process. The arbitrary or capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.

In this case, Atlantic asserts that Judge Mitterhoff erred in declining to grant summary judgment to it on the basis of the RLE. That exclusion provides as follows:

> We do not cover claims, loss, costs or expense arising out of "bodily injury," "personal injury" or "property damage" as a result of any operations, from initial inspection and pre-installation work to ongoing operations and including completed operations, involving any hot tar, wand, sprayed or sprayed-on material, torch or heat applications, hot membrane roofing or any membrane roofing system whether hot or cold application.

Atlantic contends that Remtek installed a sprayed-on polyurethane foam roof with a silicone weather seal on the main roof. Remtek also installed an EPDM roof, which is a membrane roofing system, on a lower floor. Atlantic asserts these are precisely the types of roofing or roofing systems that fall within the purview of this exclusion. It contends this exclusion plainly operates to exclude from coverage all aspects or components of the installation of such roofing material or systems are excluded from coverage.

However, after examining the pertinent expert reports limning the alleged defects in the roofing work performed by Remtek, Judge Mitterhoff concluded that the Plaintiff's expert, Porcello Engineering, Inc., had submitted an expert report opining that there was a failure of proper installation of the metal cap/coping on the parapets on the main roof and failure to use or properly apply a sealant in relation to the coping. That report also states that there was no or insufficient flashing applied at many joints between the roof and the exterior parapet walls or surface penetrations on the roof. Other expert reports submitted by other parties similarly pointed to improper flashing or capping of the parapets.

On the basis of such contentions in the Underlying Action, Judge Mitterhoff concluded that "discovery has disclosed that the roofing work performed by Remtek was not limited to the excluded sprayed-on polyurethane roofing." She held that the "parapet wall flashing and capping is not excluded work under the Atlantic Casualty policy." She further concluded as follows;

> Here Remtek's expert reports [sic] support its position that there are potentially covered claims and defense costs that may be subject to apportionment. Given the facts uncovered in discovery it is possible that a reasonable juror could find that liability may be apportioned to work not arising from the excluded sprayed or sprayed-on material and/or membrane roofing. Accordingly, the court finds that this exclusion also does not bar Remtek from seeking a defense and potentially a duty to indemnify under the policy.

Atlantic contends the Court overlooked the fact that the flashing and coping work was an integral part of the roof installation as a whole. It asserts that the description of the work in the pertinent contract between Remtek and the developer makes this connection abundantly clear, as it specifically refers to furnishing and installation of the polyurethane roofing and the furnishing and installation of all flashings, coping and trim, as required.

Atlantic also asserts that Judge Mitterhoff overlooked the broad text of the exclusion, including the language providing that the exclusion extends to "any operations," including such

operations "from initial inspection and pre-installation work to ongoing operations and including completed operations completed operations," when such operations "involv[e]" sprayed-on material or a membrane roofing system. Atlantic asserts that, by referring to "any operations . . . involving" the specified roofing material or system, the exclusion encompasses all activities arising from or relating to such materials or systems, including the flashing and parapet coping. Thus, it asserts that, under a proper construction of the exclusion, any and all property damage resulting from Remtek's roofing activities, taken as a whole, even if related to the flashing and coping work, is excluded.

This Court cannot and does not conclude that Judge Mitterhoff's ruling was arbitrary or capricious or that it rests on "palpably irrational" reasoning. Cummings, 295 N.J. Super. at 384. Nor does the motion establish that she overlooked controlling decisions or failed to appreciate the significance of probative, competent evidence. There are no new authorities cited or evidential materials provided that were not and could not have been presented with the original motion. As a result, the Court finds that Remtek has not met the standard for reconsideration of the prior decision.

This Court is particularly constrained here as the challenged ruling is that of a prior trial-level judge. Even were this judge to disagree with Judge Mitterhoff's interpretation of the exclusion and its application to the facts of this case (on the present record), it would not be appropriate to reverse that ruling so long as the ruling is not plainly erroneous or arbitrary. It is not this Court's role or function to serve as a quasi-appellate court.

Judge Mitterhoff's construction of the text of the exclusion is more than plausible. The exclusion refers specifically to "any operations . . . involving . . . sprayed-on material or . . . membrane roofing or any membrane roofing system." One can thus read the text to require a

factual connection between the "property damage" and the "sprayed-on material" or "membrane roofing or . . . membrane roofing system" before the exclusion bars coverage. This is so even though the exclusion broadly encompasses "any operations"—from pre-installation to completed operations—as any such operations must still "involve[e]" the "sprayed-on material" or "membrane roofing or . . . membrane roofing system." In the absence of such a factual connection, one may conclude the "property damage" is not the result of an operation "involving" the "sprayed-on material" or "membrane roofing or . . . membrane roofing system."

When one examines the exclusion in relation to the claims lodged in this case, it is apparent, at least on the motion record, that Remtek installed a sprayed-on polyurethane roof on the main roof on the Siena complex and on a lower floor. It installed a membrane roofing system in a different area—specifically, the stairwell and machine room bulkheads (it installed other types of roofing on the turret and terraces). The expert reports of certain parties in the Underlying Action assert that the "property damage" arises, at least in part, from the parapet coping and flashing. In particular, the reports allege failures to install flashing in certain locations on the main roof, failures to properly install flashing in other locations and improper installation of coping on parapet walls.

The metal coping and flashing are, at minimum, different components of the roofing than the "sprayed-on material" and "membrane roofing or . . . membrane roofing system" and, in the case of the coping, may represent an entirely different aspect of the roofing work altogether, as Remtek contends. The draftsman could have expressly referred to parapet coping or flashing had Atlantic intended such components to be excluded in every case.

This Court interprets Judge Mitterhoff's opinion to hold that, on a motion for summary judgment—in connection with which Judge Mitterhoff was required to confer all reasonable

inferences on the non-moving party—it was not possible to determine conclusively the relationship of the alleged inadequate flashing and parapet coping to the "sprayed-on material" and "membrane roofing or . . . membrane roofing system." This is the case even though the contract by which Remtek undertook the roofing work describes the polyurethane foam roof in a manner that could cause one to find that this roofing work included associated flashing, coping and trim. The Court concluded that a more complete record is necessary to determine whether, and the extent to which, the flashing and coping does or does not relate to the installation of either the "sprayed-on material" or "membrane roofing or . . . membrane roofing system," such that the exclusion does or does not apply, in whole or in part, to restrict coverage.

Put another way, Judge Mitterhoff determined that the questions of whether and to what extent the RLE applies to the claims asserted against Remtek in the Underlying Action are fact dependent—on the type of roofing employed, the specific nature of the defect and the causal connection of each alleged defect to the "property damage" at issue. Whether the exclusion bars coverage for all or part of any damage award against Remtek cannot be determined on a motion for summary judgment. Instead, the adjudication of such questions must await a trial before the finder of fact determining the precise nature of and reason for Remtek's liability in the Underlying Action.

Judge Mitterhoff thus determined the motion record disclosed that "there are potentially covered claims and defense costs that may be subject to apportionment." In such circumstances, Atlantic has a duty to defend and may have a duty to indemnify. There is certainly nothing "palpably irrational" about such a conclusion to warrant its reversal by this Court. Cummings, 295 N.J. Super. at 384.

Remtek argues that Judge Mitterhoff overlooked two out-of-state decisions in which courts interpreted and applied similarly (but not identically) worded exclusions in Atlantic policies—Atlantic Casualty Insurance v. Sealtite Roofing & Construction Co., 73 F. Supp. 3d 953 (N.D. Ill. 2014) and Continental Insurance Co. v. Atlantic Casualty Insurance Co., 603 F.3d 169, 181 (2d Cir. 2010). However, neither decision is controlling here (and no party asserts otherwise). That two other courts examined substantially the same exclusion—also set forth in Atlantic policies—and construed it more broadly than Judge Mitterhoff is not a basis for reconsideration of her decision, which of course is and must be grounded in New Jersey principles of policy interpretation.

Here again, even if this Court were to determine that the courts in Sealtite and Continental were right and Judge Mitterhoff was wrong, it would not be appropriate to intervene. That is for a different time and a different court. For these reasons, the Court denies Atlantic's motion for reconsideration of Judge Mitterhoff's denial of summary judgment on the basis of the RLE exclusion.

III

In its combined motion for reconsideration/summary judgment, Atlantic contends that Pennsylvania and not New Jersey supplies the law governing interpretation of the Policy. It asserts there is a true conflict of laws inasmuch as Pennsylvania courts have held that an alleged failure by a contractor to perform its work in a workmanlike manner is not an "occurrence" for purposes of a general liability insurance policy. New Jersey courts have determined otherwise. Moreover, Atlantic asserts that Pennsylvania courts have adopted a "manifestation" theory of

trigger of coverage in cases like this one involving progressive injury, while New Jersey adheres to the "continuous-trigger" theory. Air Master, 452 N.J. Super. 35.[1]

Atlantic asserts that, as interpreted and applied under Pennsylvania law, the Policy does not afford coverage to Remtek. It contends there is no "occurrence" at all, as the plaintiff and third-party plaintiffs in the Underlying Action allege, in essence, that Remtek failed to perform its roofing installation work in a workmanlike manner. Atlantic contends that, in all events, no "occurrence" took place in the policy period—August to December 2007—as the "property damage" manifested after that time.

Citing to the Restatement (Second) of Conflicts of Laws (the "Restatement"), §§ 193, 188 and 6, Atlantic contends the Court must apply Pennsylvania law to the interpretation of the Policy.[2] It asserts that the Policy was issued to Remtek, a Pennsylvania corporation, in Pennsylvania. Remtek's broker paid the premiums (after receiving the funds from Remtek) in Pennsylvania. It asserts that, at the time Atlantic issued the Policy, Remtek's operations were centered in Pennsylvania. Although it maintained an administrative office in New Jersey—the home of its principal—it was engaged in roofing projects at three locations in Pennsylvania and only one—the Siena project—in New Jersey (which project was not identified specifically in the application). Atlantic issued the Policy after applying its Pennsylvania rates and with payment of Pennsylvania taxes. It asserts the factors a Court must examine to select the governing law, as prescribed by the Restatement sections noted above, either point to Pennsylvania law or are neutral.

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[1] The Court accepts for purposes of this motion that there is a true conflict of laws, as Atlantic asserts. And, indeed, that does appear to be the case. As it has determined that New Jersey law applies, it need not consider Remtek's argument that Pennsylvania courts would find the circumstances here constitute an "occurrence."

[2] No party contends that there is a choice-of-law provision set forth in the Policy.

In Gilbert Spruance Co. v. Pennsylvania Manufacturers Association Insurance Co., 134 N.J. 96 (1992), the Supreme Court set forth the methodology to be employed in resolving choice-of-law issues as they pertain to general-liability policies. Although Gilbert Spruance and a subsequent case, Pfizer, Inc. v. Employers Insurance of Wausau, 154 N.J. 187 (1998), involved underlying claims for cleanup of contaminated waste sites, the choice-of-law methodology the Supreme Court prescribed in these cases and many of the principles the court articulated are directly apposite to the circumstances here.

In Gilbert Spruance, the court addressed "whether a comprehensive general liability policy containing a pollution exclusion, issued by an out-of-state carrier and covering an out-of-state defendant's operations, should be construed pursuant to New Jersey law." Id. at 98. The court held that New Jersey law applied, as the waste alleged to be the source of the pollution was generated in Pennsylvania and deposited in New Jersey. It concluded in the circumstances that New Jersey has the "dominant significant relationship" with "the parties, the transaction and the outcome of the controversy." Ibid.

The court declared that, in prior cases, it had "rejected the mechanical and inflexible lex loci contractus rule in resolving conflict-of-law issues in liability-insurance contracts." Id. at 102. Instead, New Jersey courts have adopted "a more flexible approach that focuses on the state that has the most significant connections with the parties and the transaction." Ibid.

The court reasoned that "[a]ccording to Restatement section 188, the general rule in contract actions is that the law of the state with the most significant relationship to the parties and the transaction under the principles stated in Restatement section 6 governs." Ibid. Restatement § 188 provides in pertinent part as follows:

> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Restatement § 188, in turn, refers to the "principles" the Court must examine in selecting the governing law according to the "flexible approach." Section 6 provides as follows:

> [T]he factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Restatement § 193 provides guidance in applying the "relevant contacts" to the case of casualty-insurance contracts, such as the Policy. Restatement § 193 provides that "[t]he validity of [the] insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy" unless, "with respect to the particular issue," some other state "has a more

significant relationship under the principles stated in § 6 to the transaction and the parties." As the Supreme Court observed in Gilbert Spruance, quoting from Restatement Sec. 193, cmt. c:

> Section 193 is based on the rationale that for a number of reasons the location of the risk is a matter of intense concern to the parties to the insurance contract. And it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the risk is to be principally located would be applied to determine many of the issues arising under the contract. Likewise, the state where the insured risk will be principally located during the term of the policy has a natural interest in the determination of issues arising under the insurance contract.
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> [Gilbert Spruance, 134 N.J. 103–04.]

At the same time, however, there is recognition in Restatement § 193 that, in certain circumstances, there may not be a "principal location of the insured risk." Thus, Restatement § 193 cmt. a states that where "there may be no principal location of the insured risk . . . the location of the risk can play little role in the determination of the applicable law. The law governing insurance contracts of this latter sort must be determined in accordance with the principles set forth in the rule of § 188." And Restatement § 193 cmt. b notes that situations where the risk cannot "be located, at least principally, in a single state . . . and where the location of the risk has less significance, include . . . where the policy covers a group of risks that are scattered throughout two or more states."

Applying these principles to the case before it, the Gilbert Spruance court stated that "in determining the choice-of-law rule to govern casualty-insurance contracts, such as the CGL policies in this case, we look first to Restatement Section 193." 134 N.J. at 111–12. The court referred to the "knotty problem of how to determine where the insured 'risk' is located." Id. at 112. It concluded that "[d]efining the principal location of the insured risk is not a matter of superficial review." Ibid. (internal quotation marks omitted). Instead, "[o]nly by close study of

the context, if then, can one ascertain the precise sense in which [the term risk] is used." Ibid. (internal quotation marks omitted).

The court stated that it could arbitrarily choose either the state of waste generation (Pennsylvania) or the state of waste disposal (New Jersey). In the alternative, it stated it could recognize that, because the risk was "to some degree transient," a "more extended analysis pursuant to § 6(2) is appropriate to determine whether, apart from or in addition to § 193 significance, [New Jersey] or [Pennsylvania] has a more significant relationship to the transaction and the parties." Id. at 113 (internal quotation marks omitted). It expressly chose the latter approach.

The court found that "our urgent concern for the health and safety of [our] citizens" supported the application of New Jersey law. Ibid. (internal quotation marks omitted). It found a basis for such urgent concern in the various statutory enactments dealing with the remediation of waste sites.

The court recognized that accepting what it called the site-specific approach to choice of law over the uniform-interpretation approach gave rise to a situation in which the law of multiple states could apply to interpretation of the same insurance contract. As to such outcome, the court expressly adopted the reasoning of the Appellate Division in the case before it and in Johnson Matthey, Inc. v. Pennsylvania Manufacturers Insurance Co., 250 N.J. Super. 51 (App. Div. 1991). Referring to the Appellate Division in Gilbert Spruance, the Supreme Court stated:

> The court pointed out that in Johnson Matthey, it had characterized nationwide uniformity of policy interpretation as "an illusory goal, not truly achievable or necessarily preferable." 254 N.J. Super. at 49. The court concluded that "[s]ite-specific uniformity, on the other hand, is achievable, and represents a choice of the law of the jurisdiction that is most concerned with the outcome." Id. at 49–50. Moreover, the court noted, the failure to include a choice-of-law

> provision in the contracts "tends to show that uniform interpretation was not a conscious goal of the contracting parties." Id. at 50.
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> [Gilbert Spruance, 134 N.J. at 101, 114.]

In Pfizer, 154 N.J. 187, a case involving coverage for multiple waste sites, including many located outside of New Jersey, the Supreme Court determined that the law of New York or of the state in which the waste site was located would apply to interpretation of the polices in relation to the sites located outside of New Jersey. It concluded that New Jersey had minimal interests in the coverage issues pertaining to such sites. It held the law of New York would apply—as New York was the locus of Pfizer's headquarters and the place of contracting. However, in those cases where the law of the waste site rendered inoperative the pollution exclusion in the polices or differed from New York's law as to claims of late notice—vitiating coverage for late notice without a showing of prejudice to the insurer—the court held the law of the waste site would apply.

Summarizing its prior holding in Gilbert Spruance, the court noted that "[w]hen the policy covers risks located primarily in a single state, the choice-of-law issue can be straightforward. For example, there is no choice-of-law issue where the policyholder is located in one state, the environmental liability arises out of the same state, and the policies are issued by a state-based insurer for that one site." 154 N.J. at 195 (internal quotation marks omitted). It observed that "[a]n easy example is that of a CGL policy covering a solid waste treatment plant creating a risk in a single state." Ibid. However, "[a]t the other end of the spectrum are cases where a single insured seeks coverage under CGL policies for certain environmental and toxic tort liabilities, including . . . [multiple] sites located in . . . different states." Ibid. (internal quotation marks omitted). In such circumstances, when such an insured operation or activity is "predictably multistate," the significance of the principal location of the insured risk

"diminishes" and Restatement § 193 directs that "the governing law is that of the state with the dominant significant relationship according to the principles set forth in Restatement section 6 as applied to the particular issue involved." Ibid. (internal quotation marks omitted)

As it did in Gilbert Spruance, the court recognized that "[t]he site-specific approach of section 193 inevitably means that more than one state's law may govern coverage questions arising under a casualty policy." The court concluded that Restatement § 193 cmt. f "addresses the problems encountered when an insurance policy insures multiple risks located in different states which by statute require specific forms of insuring clauses." Ibid. (quoting The Rouse Co. v. Federal Ins. Co., 991 F. Supp. 460, 463 (D. Md. 1998)). It discerned from comment f that, in such a case, "the single policy insuring multiple risks will usually incorporate the statutorily-mandated forms of the states involved, and the courts will, presumably, treat the policy as involving separate policies, each insuring an individual risk." Id. at 195–96 (quoting Rouse Co., 991 F. Supp. at 463).

At the same time, the court determined that Gilbert Spruance did not establish a "bright-line rule" for choice of law in waste site cases, even though such a rule would be "attractive." Id. at 196. Instead, the court stated that "there is no way to avoid a careful site-specific determination, made upon a complete record." Ibid. (internal quotation marks omitted). It concluded that, "in order to choose the applicable law that governs the disputed issues, Spruance requires that we turn to the section 6 analysis." Ibid.

Citing with approval to General Ceramics, Inc. v. Firemens' Fund Insurance Cos., 66 F.3d 647 (3d Cir. 1995), the Pfizer court determined that the Restatement § 6 factors could be grouped as follows: the competing interests of relevant states; the national interests of commerce among the states; the interests of the parties; and interests of judicial administration. The court

characterized the first factor as requiring an assessment to "consider whether application of a competing state's law under the circumstances of the case will advance the policies that the law was intended to promote." Id. at 198 (internal quotation marks omitted). It pointed out that the law can be "either the decisional or statutory law of a state." Ibid. It determined that "[t]he focus of this inquiry should be on what [policies] the legislature or court intended to protect by having that law apply to wholly domestic concerns, and then, whether those concerns will be furthered by applying that law to the multi-state situation." Ibid. (internal quotation marks omitted). It declared that "[t]his is another way of saying that if a state's contacts [with the transaction] are not related to the policies underlying its law, then that state does not possess an interest in having its law apply." Ibid. (internal quotation marks omitted)

The court concluded that the interests of commerce among the states "require courts to consider whether application of a competing state's law would frustrate the policies of other states." Id. at 199. It determined that the interests of the parties "require courts to focus on their justified expectations and their needs for predictability of result." Ibid. It noted that "[t]hese are basic purposes of contract law, especially insurance law." Ibid. Finally, the interests of judicial administration "require a court to consider whether the fair, just and timely disposition of controversies within the available resources of courts will be fostered by the competing law chosen." Ibid.

In applying these principles to the case before it, the Pfizer court concluded that New Jersey did not have an interest in the application of its case law interpreting the "sudden and accidental" pollution exclusion—which had the effect of broadening coverage for pollution sites—to determine coverage issues involving sites located outside of New Jersey. It determined,

for example, that no interest of New Jersey was advanced by applying its law to determine coverage issues to a site in Indiana, if Indiana courts have construed the exclusion more broadly.

The court determined that the laws of New York and the individual waste sites should govern as these were the states with the greatest interest in the resolution of the coverage issues. It noted that New York had adopted a coverage-narrowing interpretation of the pollution exclusion. In such circumstances, the court held it would apply the law of the waste site to interpret the exclusion where the site at issue was located in a state that adopted a coverage-broadening interpretation of the exclusion. In such circumstances, "if New York law were applied to determine coverage at a waste site in Indiana and that state's law mirrored the law of Spruance and Morton [broadening coverage], the interests of Indiana would be hindered." Pfizer, 154 N.J. at 203. As a result, the law of the waste site should be applied because under the site-specific approach it would have the dominant significant relationship to the issue. Id. at 205.

Assessing the interests of the parties in predictability, the court concluded that "[p]redictability appears to be a minor virtue in view of the willingness of insurers to issue multi-site policies that will be subject to the unpredictable substantive law of many states fixing the liabilities of their insureds." Id. at 202–03 (internal quotation marks omitted). It noted, as it did in Gilbert Spruance, that "[i]t is likely that the parties could have contracted for more predictable results had they inserted choice-of-law provisions in the insurance contracts." Id. at 203. The court declared that "in the absence of a choice-of-law provision, a policyholder would expect that it would be indemnified under the law in effect at the place where liability is imposed." Ibid.

In Continental Insurance Co. v. Honeywell International, Inc., 234 N.J. 23 (2018), the Supreme Court determined that New Jersey law would apply to determine questions concerning the allocation of the insured's losses among insurers for thousands of product liability claims.

The case related to claims of individuals whose first exposure to asbestos-containing products of the insured began and continued during the period in which numerous insurers sold policies to the insured. The policies of many insurers were "triggered" under the "continuous-trigger" theory of coverage.

However, Travelers Casualty Surety Co. ("Tavelers"), which sold excess insurance during the relevant period, claimed the law of Michigan (the state where the insured's headquarters was located at the time the policies issued), and not the law of New Jersey, should apply to determine the method of allocation. Under New Jersey law, the court would allocate liability based on time-on-the-risk and the limits of coverage, thus allocating more of the losses to years in which the insured had greater total limits of coverage. Under Michigan law, the court would allocate based solely on the basis of time-on-the-risk and without consideration of the limits of coverage.

Bendix Corporation was a nationwide manufacturer of asbestos-containing products. From 1969 to 1983, its corporate headquarters were located in Michigan. Its insurance office was located there. The Travelers polices were brokered, issued and delivered in Michigan.

At the same time, Bendix has significant contacts with New Jersey. Until 1975, its largest center of operations and payroll was located there. In 1983, Honeywell's predecessor acquired Bendix and it thereafter had its principal place of business in New Jersey.

The court first rejected Travelers's contention that it should resolve the choice-of-law issue by relying on the result in State Farm Mutual Auto Insurance Co. v. Estate of Simmons, 84 N.J. 28 (1980). In that case, the court applied Alabama law to resolve coverage issues involving an automobile accident in New Jersey. The insurer issued the applicable policy in Alabama where the insured vehicle was principally located at the time of issuance of the policy.

The Simmons court relied upon Restatement § 193 and held the following:

> [I]n an action involving the interpretation of an automobile liability insurance contract, the law of the place of the contract will govern the determination of the rights and liabilities of the parties under the insurance policy. This rule is to be applied unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield.
>
> [Id. at 37.]

In so holding, the court reasoned that selection of the law of the place of contracting "will generally comport with the reasonable expectations of the parties concerning the principal situs of the insured risk during the term of the policy and will furnish needed certainty and consistency in the selection of the applicable law." Ibid.

In Continental, the court stated that "we reject the insurers' argument that Simmons requires this analysis to begin with Restatement § 193 and its presumption that the law of the place of contracting applies." 234 N.J. at 56. Instead, it concluded that "[n]either Simmons nor § 193 persuasively pertain in circumstances such as we have here: nationwide products-liability claims spanning many years of product exposure rather than a single occurrence event." Ibid.

The court pointed to the portion of the opinion in Simmons stating that it was necessary to determine if some other state had a more significant relationship to the parties and the underlying issue. The court determined that, in a complex setting involving mass torts, it was necessary to consider other Restatement sections—namely Sections 6 and 188—to employ the analytical methodology used by the court in Gilbert Sprucance and Pfizer. Referring to Gilbert Spruance, the court stated that "we recognized that a clear understanding about the principal location of the insured risk would not necessarily be present and so a different approach was warranted." Id. at 54.

Examining the Restatement § 188 factors, the court concluded that, in the case before it, the place of contracting was an insignificant contact inasmuch as "the insured risk is not site-specific." Id. at 57. Although acknowledging the place of negotiation might be of importance, the court found the place of performance and the domicile, residence and places of incorporation and business of the parties to warrant stronger consideration. These factors favored selection of New Jersey law.

The court stated that "heavy weight must be given to the nature of the insured risk and its site, or to an otherwise performance-related location consideration." Id. at 58. It noted that "New Jersey is the longstanding domicile of the insured in this litigation (since 1983)" because "Honeywell is the successor to the rights of Bendix under the insurance contract." Ibid. Moreover, "Honeywell's place of domicile and business (New Jersey) is easily determined at the time coverage is invoked due to litigation, triggering the terms of the insurance contract for these products liability claims." Ibid. The court further concluded that "New Jersey is also the place of performance for the contractual defense and indemnification of Honeywell in this litigation involving long-tail claims on an occurrence policy for a predecessor's products cast into the national marketplace." Ibid. It also noted that, even before the Honeywell acquisition of Bendix, "New Jersey was integrally involved in Bendix's business operations." Ibid.

The court then found that application of New Jersey's approach to allocation would advance the policies underlying that principle, including maximizing insurance resources available for the losses and spreading risk throughout the insurance industry. The court concluded that applying the New Jersey method of allocation would "benefit the State because [it] achieve[s] worthy goals enhancing the interests of a New Jersey insured, and the claimants

who were injured by progressive asbestos-related disease, by maximizing insurance resources and prompting insureds to obtain and maintain insurance coverage." Id. at 59.

It further concluded that application of New Jersey's allocation methodology would not undermine any interest of Michigan. It determined that Michigan—the place of Bendix's former headquarters and the place of negotiation of the policies—did not have a strong interest "in insisting that its allocation methodology apply in this insurance dispute, which no longer involves a Michigan-based company." Ibid. It determined that "[t]his matter involves nationwide products-liability claims relating to items manufactured in virtually all fifty states and internationally, sold in the national marketplace, and that now are the liability of a successor, New Jersey-based corporation." Ibid.

In this case, Atlantic contends that the Court should look primarily to Simmons to supply the appropriate analysis as this case, unlike Continental, does not involve a nationwide product manufacturer. Instead, it asserts this case involves a single risk and an insured whose operations were largely centered in Pennsylvania. At the time of contracting, all but one of Remtek's ongoing projects were located in Pennsylvania. Atlantic also urges that the case does not involve the public-health interests that informed the selection of New Jersey law in a case like Gilbert Spruance involving remediation of waste sites located here.

But the Court finds that this case, like Gilbert Spruance and Pfizer, involves activity that is predictably multistate. The Policy is not a policy covering a motor vehicle principally located in one state. It is a policy purchased and written to cover a roofing contractor that made clear its intention to operate in several states. Although it is true that Remtek's operations were not nationwide in scope, the record reflects that Remtek nonetheless made clear in seeking insurance

from Atlantic that it intended to operate its roofing contracting business in New Jersey and Delaware, in addition to Pennsylvania.

As the court in Gilbert Spruance recognized, comment b to Restatement § 193 provides that the locus of the insured risk is less significant when the policy covers a group of risks that are distributed among two or more states. The business operations of Remtek may not have been nationwide in character, but they did entail operations—and therefore risks—in two or more states. In such circumstances, the court must look to Restatement §§ 188 and 6 and determine if a state other than Pennsylvania has a more significant relationship to the transaction and the parties.

Here, several significant contacts point to the selection of New Jersey law to interpret and apply the term "occurrence" within the Policy and to establish the appropriate trigger of coverage. It is true that Remtek is a Pennsylvania corporation and the Policy was negotiated and issued there through Remtek's insurance agent. However, New Jersey was and is the location of Remtek's corporate offices—the state of residence of its principal—and thus the locus of its administrative activities. New Jersey is also where Atlantic would perform the defense and indemnity obligations associated with the Policy in respect of this case. Finally, New Jersey is where Remtek performed the roofing work that is the subject of the Underlying Action.

When one examines the competing interests of the states, the interest of New Jersey in having its law apply is readily apparent. Under New Jersey law, the circumstances alleged here—third-party property damage resulting from defects in workmanship by Remtek in installing the roofing at the Siena complex—would constitute a covered "occurrence" under the Policy. Under Pennsylvania law, the claim, even if proved, would apparently not be covered, as such claim does not constitute an "occurrence."

New Jersey has a strong interest in the availability of insurance coverage for any defective workmanship in the roofing of the Siena complex, for the benefit not only of Remtek itself but of the residents and the developer. This case may not implicate matters of public health as in a case involving contaminated waste sites, but it nonetheless does involve a large apartment complex with numerous residents potentially affected by defective workmanship. Application of New Jersey's coverage-broadening interpretation of the policy term "occurrence" would advance the State's interest in coverage for the consequences of defective workmanship in such circumstances.

New Jersey likewise has an interest in maximizing the availability of insurance resources for any property damage resulting from defects in construction at the Siena complex. Application of New Jersey's continuous-trigger theory of coverage—which has the potential to spread coverage among multiple policies—advances that interest.

At the same time, it is not apparent what interest Pennsylvania has in the application of its law to the circumstances here. It has no discernable interest in the application of its coverage-limiting interpretation of the term "occurrence" to a circumstance involving an insured with its principal offices in New Jersey and a risk located in New Jersey. Nor would any policy or interest of Pennsylvania be frustrated by the selection of New Jersey law to govern this dispute. Although Atlantic used its Pennsylvania rates and paid Pennsylvania taxes in issuing this policy, it is not a Pennsylvania-based insurer.

It is true that application of New Jersey law to this dispute gives rise to the possibility that the law of multiple states could apply to the same policy, thereby impairing the interest of the parties in having a uniform body of law govern the interpretation of the single Policy. But as the Supreme Court pointed out in both Gilbert Spruance and Pfizer, the concept of uniformity in

circumstances involving multistate operations such as those of Remtek and Atlantic is largely illusory. Moreover, had uniformity been a significant concern of Atlantic, it could have installed a governing-law provision in the Policy.

The Court concludes that, in the circumstances here, New Jersey has the more significant relationship to the parties and the transaction at issue. Accordingly, New Jersey law applies to the interpretation to the pertinent policy terms.

It follows that the alleged defects in the roofing work performed by Remtek in its roofing work at the Siena complex are potentially subject to coverage as an "occurrence." In addition, as established by the Appellate Division in Air Master, the continuous-trigger theory of coverage applies, as Judge Mitterhoff previously determined. For these reasons, the Court denies Atlantic's motion for summary judgment grounded in the application of Pennsylvania law to interpret and apply the Policy term "occurrence" and to determine the applicable trigger of coverage.

The Court likewise declines to reconsider Judge Mitterhoff's prior rulings granting partial summary judgment to Remtek as to the duty to defend and denying Atlantic's motion as to Remtek's bad-faith claim. Apart from the issue of the possible application of Pennsylvania law to the interpretation of the Policy, Atlantic has not adduced any new evidence or advanced any legal or factual arguments in support of its current motion that it did not assert in connection with the prior motion practice. Nor has it established that Judge Mitterhoff overlooked controlling legal authorities or failed to appreciate the significant of probative, competent evidence in rendering her prior decisions. Cummings, 295 N.J. Super. at 384. As noted above, it is not the function of this Court to overrule the decisions of another judge absent clear error.

In granting Remtek's motion for partial summary judgment as to the duty to defend, Judge Mitterhoff expressly recognized that the duty to defend under a general liability insurance policy, such as the Policy, is broader than the duty to indemnify. She concluded that, in examining the duty to defend under such a policy, the Court must lay the allegations of the complaint lodged against the insured alongside the policy and determine if the policy would afford coverage if the allegations of the complaint were to be sustained. She noted that the Court could also examine extrinsic materials—here, expert reports of the adverse parties—to determine if there is a potential for coverage.

Having established (correctly) the applicable legal principles, Judge Mitterhoff then proceeded to apply them to the claims asserted against Remtek and determined there was a potential for coverage, inasmuch as the allegations lodged against Remtek could establish a covered "occurrence" during the policy period. Nothing in the present motion establishes that these conclusions were "palpably irrational." Cummings, 295 N.J. Super. at 384.

Atlantic asseverates that Judge Mitterhoff overlooked several grounds it asserted that would establish the Policy does not afford coverage to Remtek. But in both the earlier motion practice and on this motion, Atlantic cited specifically only to its assertions concerning the existence vel non of a covered "occurrence" under the Policy and the effect of the RLE—matters that the Court expressly addressed in its prior opinion. Although Remtek is, of course, free to raise any such additional issues in further proceedings to determine whether it has a duty to indemnify, it cannot seek reconsideration of a prior decision of the Court on the basis of arguments it failed to raise at the time with any meaningful specificity.

Finally, Atlantic has not established any basis for reconsideration of the Court's denial of summary judgment to Atlantic as to Remtek's claim for bad faith (and the Court's severance of

such claim). In her prior decision, Judge Mitterhoff expressly recognized the claim for bad faith is premature, as there has not been a judgment entered against the insured in excess of policy limits. For that reason, she severed and deferred any determination of the cause of action asserting bad faith until after the conclusion of the Underlying Action.

Atlantic's motion for reconsideration of this ruling is a rehash of exactly the same arguments presented to Judge Mitterhoff—arguments that she acknowledged and on which she ruled. As her decision does not rest on a palpably irrational basis, this Court discerns no reason for reconsideration. Cummings, 295 N.J. Super. at 384.

IV

Atlantic also seeks an Order for severance with respect to the trial of this case, which is consolidated with the Underlying Action. At issue are three components of the consolidated action: the Underlying Action; Atlantic's declaratory judgment action (involving insurance coverage for Remtek's liabilities in the Underlying Action); and Remtek's Third-Party Complaint (alleging professional negligence and fraud in the procurement of the insurance from Atlantic). Specifically, Atlantic's motion requests that the Court: 1) sever its declaratory judgment action from the Underlying Action; 2) sever Remtek's third-party professional malpractice and fraud action from Counts I through XVII of the Complaint in Atlantic's declaratory judgment action; and 3) hold trial of Counts I through XVII of Atlantic's Complaint in abeyance until after trial of the Underlying Action. For the reasons stated below, the Court grants the motion.

As a threshold matter, the Court first addresses Remtek's argument that this motion is essentially an improper motion to reconsider prior Orders of the Court that denied motions to sever filed by Atlantic. Namely, there are two prior orders—one issued by Judge Gross-Quatrone

on May 10, 2016 and the other by Judge Mitterhoff on June 10, 2016—denying motions filed by Atlantic seeking to sever the insurance-related suit from the Underlying Action.

This argument is inapplicable and unavailing at this juncture. Although unaccompanied by Statements of Reasons, it is apparent the Court issued the Orders while discovery in both actions was ongoing. Thus, it is conceivable that the Court denied applications for severance as premature. Because the Court had previously consolidated the cases for discovery purposes and they are factually interdependent (as described below), the Court likely decided to leave the cases undisturbed, choosing instead to revisit the severance issue after the close of discovery.

Furthermore, Judge Mitterhoff's Order—the most recent addressing severance—denied Atlantic's motion without prejudice. This further suggests that the Court left the issue of severance and the manner in which trial or trials would proceed to another day. Based on the denial without prejudice, the Court concludes Atlantic was free to re-file its motion without establishing grounds for reconsideration.

Under R. 4:38-2(a), the Court, "for the convenience of the parties or to avoid prejudice, may order a separate trial of any claim, cross-claim, counterclaim, third-party claim, or separate issue, or of any number of claims, cross-claims, counterclaims, third party claims, or issues." The Court finds that separate trials are warranted in all the circumstances here.

The most logical and efficient manner in which to proceed in this case is to conduct the trial of the Underlying Action first and then proceed to any trial of Atlantic's and Remtek's insurance coverage and related claims. A trial of the consolidated action—involving proofs as to the claimed construction defects and insurance-related issues—would almost certainly confuse the jury and unnecessarily complicate and prolong the proceeding. It would also compel

parties—such as Atlantic and Knight—to attend and participate in a trial involving issues that will perforce range far beyond those with which they are directly concerned.

Moreover, trying the insurance issues in the Underlying Action could prejudice the Plaintiffs in that case and even Remtek itself, as proceeding in this manner risks improperly tying the jury's liability determination to questions concerning whether Remtek has insurance. See Weiss v. Goldfarb, 154 N.J. 468, 480 (1998) ("References to insurance can prejudice a defendant by suggesting that the defendant did not care whether proper care was exercised because the insurance company would pay if found to be at fault. A reference to coverage might even suggest that a larger award may be appropriate because a 'deep pocket' is available."); see also Krohn v. N.J. Full Ins. Underwriters Ass'n, 316 N.J. Super. 477, 481–82 (App. Div. 1998) ("[T]he probative value of information regarding whether a person is insured or not is substantially outweighed by the potential for undue prejudice.")

It is similarly prudent to sever Counts I through XVII of Atlantic's Complaint in the declaratory judgment action from a trial of Count XVIII and Remtek's third-party action. Counts I through XVII in the declaratory judgment action involve the construction and application of several provisions of the Policy. Count XVIII, on the other hand, seeks rescission of the Policy based on an alleged fraud by Remtek—the same alleged fraud that is, in part, the basis for Remtek's third-party claim against Knight. Count XVIII and the third-party claim are thus factually connected and should be tried together.

These matters should, in turn, be tried separately from any trial as to Counts I through XVII. The alternative—a single trial as to coverage and fraud/negligence by Remtek and/or Knight—would risk confounding a jury and protracting the proceedings with a multiplicity of disparate issues and facts. Should a single trial take place, it would be necessary for the jury to

hear evidence and find facts going to coverage vel non under the Policy, on the one hand, and fraud/negligence in the procurement of the insurance, on the other hand.

Sequencing the trials in this manner would also result in the most efficient deployment and utilization of judicial and party resources. A trial in the Underlying Action will determine the scope of Remtek's liability, if any, for defects in the roofing of the Siena complex and will establish the specific nature, location, extent and consequences of any such defects. This will then inform the need for and parameters of a trial of Atlantic's declaratory judgment action as to the existence and scope of coverage owed to Remtek for its liabilities. Moreover, should Remtek prevail in a trial in the Underlying Action, a trial of Atlantic's and Remtek's claims would be unnecessary.

Likewise, if Remtek loses in the Underlying Action, but then prevails in the declaratory judgment action, its third-party claims would be rendered moot. Thus, severance would best serve the interest in judicial efficiency by ensuring that the Court is not required to conduct trial as to issues that could be mooted by the outcome of prior proceedings and, in all events, that the Court and the parties can properly frame the issues to be addressed in each trial that is necessary.

For these reasons, the Court grants Atlantic's motion to sever. The consolidated action will proceed to trial in the following fashion: First, there will be a trial in the Underlying Action. Should Remtek not prevail, there will be a trial of any remaining triable issues raised by Counts I through XVII of the Complaint of Atlantic in its declaratory judgment action. If and as necessary following trial of that portion of the action, there will be a trial of any remaining triable issues raised by Count XVIII of Atlantic's Complaint and Remtek's third-party action.

V

The Court now turns to Tri-State's motion for reconsideration of Judge Mitterhoff's denial of its prior motion for summary judgment regarding Remtek's common-law fraud claim and/or its renewed motion for summary judgment. Remtek alleges that Tri-State committed a fraud by binding coverage from Atlantic on the basis of an application that, according to Remtek, contained a forged signature of a Remtek representative and false statements concerning the nature of Remtek's roofing work. Tri-State used this application to bind coverage that, as discussed above, Atlantic eventually cancelled upon learning of the nature of the roofing work Remtek was performing at the Siena complex.

Judge Mitterhoff denied Tri-State's prior motion for summary judgment on the issue of common-law fraud for the following reasons:

> At bottom, the court has before it two parties pointing fingers at the other. Remtek adamantly claims it did not prepare nor sign the supplemental application for insurance, and alleges that it was Knight and/or Tri-State who prepared the application and, at the very least, that both parties knew about its fraudulent nature when Tri-State procured insurance for Remtek. Tri-State adamantly denies that it prepared or knew about the fraudulent insurance application, and alleges that Remtek is the culpable party. Absent from the record before the court is probative evidence that conclusively bolsters either parties' allegations. It is clear that genuine questions of fact exist pertaining to the subject insurance application, including but not limited to the identity of who prepared the application, whether Mr. Metz's signature is a forgery and, if it is forged, who forged it, who submitted the application and the knowledge and/or complicity on Tri-State's behalf regarding the fraudulent nature of the application. Accordingly, Tri-State has failed to show that no genuine questions of material fact exist regarding Remtek's common law fraud claim and, therefore, the court will deny that part of Tri-State's motion seeking to dismiss the fraud cause of action.

The Court finds this reasoning is surely not plainly erroneous or arbitrary. Instead, it represents a rather straightforward application of the standard for summary judgment in

circumstances in which the material facts are disputed and discovery remains open. Accordingly, Tri-State has not met the standard for reconsideration.

However, following the Court's disposition of this motion, the parties had additional time for discovery as to the claims asserted by Tri-State. Discovery is now closed. Tri-State renews its motion for summary judgment following the close of discovery.

In order to prevail on a claim for common-law fraud, Remtek must prove each of the elements as follows:

> (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.
>
> [Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172–73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)).]

Moreover, Remtek is required to establish its fraud claim by clear and convincing evidence. See Weil v. Express Container Corp., 360 N.J. Super. 599, 613 (App. Div. 2003) ("fraud is never presumed, but must be established by clear and convincing evidence").

Indeed, claims "sounding in fraud" must satisfy the "heightened fraud pleading requirement" in R. 4:5-8(a). N.J. Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l. Inc., 387 N.J. Super. 469, 484 (App. Div. 2006). That is, in an allegation of fraud, "particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." R. 4:5-8(a). However, "[m]alice, intent, knowledge, and other condition of mind of a person may be alleged generally." Id. A court may dismiss a complaint alleging fraud at the pleading stage if "the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 315 (App. Div. 1999).

On a motion for summary judgment, the Court is required to examine the competent evidential materials in light of the standard of proof. In the circumstances here, it must examine whether a rational trier of the facts could resolve the disputed issues in favor of Remtek, given its burden to establish the elements of its claim for fraud by clear and convincing evidence. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533, 540 (1995) ("That weighing process requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact.") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254–56 (1986)).

The evidence on this record supporting a claim of fraud directed at Tri-State, which the Court can and does accept as true for purposes of this motion, is as follows: Tri-State initially received an unsigned application for coverage indicating that Remtek was engaged in roofing installations—involving hot tar, sprayed-on materials or membrane roofing—that would be excluded from the policy it was seeking. Tri-State called this matter to the attention of Knight. The executed application subsequently submitted under the signature of Gary Metz, Remtek's accountant and coverage liaison, stated—inaccurately—that Remtek did not perform such installations. Metz denies that he signed the application and has testified the signature on the document is not his. Terry Joyce ("Joyce"), Knight's principal, avers that he did not forge the signature of Metz on the insurance application at issue.

In the circumstances of this case, in order to proceed with a claim of fraud against Tri-State, Remtek must establish, by clear and convincing evidence, that Tri-State forged Metz's signature on the application for insurance or that Tri-State knew the application was forged and proceeded to bind coverage nonetheless. But even granting all favorable inferences from the

motion record in favor of Remtek, the Court finds as a matter of law that it cannot sustain that burden.

The facts in the motion record establish at most that either Knight or Tri-State forged Metz's signature. If Knight is the culpable party, the evidence would permit a finding that Tri-State also had some reason to suspect the possibility of a fraud given the prior submission of an application stating different facts about Remtek's roofing work. In such circumstances, the evidentiary record might support a triable claim of negligent conduct by Tri-State for accepting the application from Knight without inquiring further as to its bona fides, particularly as a claim sounding in negligence is subject to the preponderance of the evidence standard of proof.

However, the facts here, even when viewed in the light most favorable to Remtek, do not permit the trier of fact to determine that Tri-State has met its burden of establishing, by clear and convincing evidence, that Tri-Sate committed or was knowingly complicit in a fraud. Put differently, given the requirement of proof of the elements of fraud by clear and convincing evidence, it is not enough merely to establish at trial that either Knight and/or Tri-State forged the application. Without direct evidence that a Tri-State representative signed Mr. Metz's name to the application or knew that someone at Knight had forged the signature, Remtek cannot proceed to the trier of fact on a claim of fraud.

In this regard, the Court observes that this action has been ongoing for several years and discovery has concluded. Yet Remtek did not obtain any evidence specifically linking Tri-State to the alleged forgery. For example, Remtek did not obtain a handwriting expert to render opinions that could establish a forgery by Tri-State.

Moreover, additional evidence adduced since Judge Mitterhoff's initial decision undermines, rather than bolsters, Remtek's fraud claim as it relates to Tri-State. Timothy Nuhfer

("Nuhfer"), Remtek's principal, testified that he has no basis to attribute the alleged forgery to Tri-State:

> "Do you have any reason to believe that Tri-State acted dishonestly in connection with the placement of Remtek's insurance with Atlantic?"
>
> "No."
>
> "Do you have a reason to believe that they lied about anything to anyone with respect to your insurance?"
>
> "No."
>
> "Do you have reason to believe that they forged any documents?"
>
> "No."

Indeed, in its Counterstatement of Undisputed Material Facts in opposition to this motion, Remtek admitted Tri-State's averment that there is "no evidence that anyone at Tri-State prepared, supplemented, or altered the signed or unsigned application forms."

For these reasons, the Court finds that no rational trier of the facts could determine that Remtek has satisfied the elements of a fraud claim directed at Tri-State. Accordingly, the Court grants Tri-State's renewed motion with respect to such claim. As the fraud claim is the only remaining claim pending against Tri-State, the effect of the Court's ruling is to dismiss Tri-State from the action altogether.

VI

For the reasons set forth herein, the Court denies Atlantic's motion for reconsideration in its entirety. Specifically, the Court declines to reconsider the following prior rulings of Judge Mitterhoff: the denial of summary judgment on the basis of the RLE exclusion; the granting of partial summary judgment to Remtek as to the duty to defend; and the denial of Atlantic's motion as to Remtek's bad-faith claim.

Atlantic's motion to sever is granted. The consolidated action will proceed to trial in the following manner: First will be a trial in the Underlying Action. Should Remtek not prevail, there will be a trial of any remaining triable issues raised by Counts I through XVII of the Complaint of Atlantic in its declaratory judgment action. If necessary, there will then be a trial of any remaining triable issues raised by Count XVIII of Atlantic's Complaint and Remtek's third-party action.

The Court grants Tri-State's renewed motion for summary judgment regarding the remaining claim of common-law fraud against it. Tri-State is therefore dismissed from the action altogether. An Order accompanies this Statement of Reasons.