

11-4055-cv
Olin Corp. v. Am. Home Assurance Co.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: September 28, 2012

Decided: December 19, 2012)

Docket No. 11-4055-cv

OLIN CORPORATION,

Plaintiff-Appellant,

v.

AMERICAN HOME ASSURANCE COMPANY,

Defendant-Appellee,

OLIN-HUNT SPECIALTY PRODUCTS INC.,

Third-Party-Defendant,

ONEBEACON AMERICAN INSURANCE COMPANY, referred to in this litigation as COMMERCIAL
UNION INSURANCE COMPANY,

Cross-Defendant,

INSURANCE COMPANY OF NORTH AMERICA, HANOVER INSURANCE COMPANY, as successor to
MASSACHUSETTS BONDING AND INSURANCE COMPANY, AMERICAN RE-INSURANCE COMPANY,
CERTAIN UNDERWRITERS AT LLOYDS LONDON AND LONDON MARKET INSURANCE COMPANIES,
LONDON MARKET INSURANCE COMPANIES, COMMERCIAL UNION INSURANCE COMPANY, as
successor to EMPLOYERS LIABILITY ASSURANCE CORPORATION LTD. AND EMPLOYERS
COMMERCIAL UNION INSURANCE COMPANY AMERICA, CONTINENTAL CASUALTY COMPANY,
EMPLOYERS INSURANCE OF WAUSAU, C.E. HEALTH COMPENSATION & LIABILITY INSURANCE
CO., as successor to FALCON INSURANCE COMPANY, successor to EMPLOYERS SURPLUS LINES
INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE

1 COMPANY, GREAT AMERICAN INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY,
2 LONDON & EDINBURGH INSURANCE COMPANY LIMITED, CAPITAL MARKETS ASSURANCE CORP.,
3 as successor to NATIONAL AMERICAN INSURANCE COMPANY OF NEW YORK, successor to
4 STUYVESANT INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF
5 PITTSBURGH, PA, NORTH RIVER INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY A/S/O
6 MARCO DEL GADO, as successor to NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
7 EMPLOYERS INSURANCE COMPANY OF WAUSAU, ONEBEACON AMERICA INSURANCE COMPANY,
8 formerly referred to in this litigation as COMMERCIAL UNION INSURANCE COMPANY, AETNA
9 CASUALTY & SURETY COMPANY, GENERAL REINSURANCE CORPORATION, GOVERNMENT
10 EMPLOYEES INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HOME INSURANCE
11 COMPANY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INTEGRITY INSURANCE
12 COMPANY, GREENWICH INSURANCE COMPANY, as successor to HARBOR INSURANCE COMPANY,
13 NATIONAL CASUALTY COMPANY, TRANSIT CASUALTY COMPANY, AIU INSURANCE COMPANY,
14 CONTINENTAL CORPORATION, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GRANITE
15 STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, NATIONAL AMERICAN
16 INSURANCE COMPANY OF CALIFORNIA, as successor to STUYVESANT INSURANCE COMPANY,
17 NATIONAL CASUALTY COMPANY, NEW YORK PROPERTY/CASUALTY INSURANCE SECURITY
18 FUND, CENTURY INDEMNITY COMPANY, as successor to INSURANCE COMPANY OF NORTH
19 AMERICA,

20
21 *Defendants.*

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24
25 Before:

26
27 CHIN, LOHIER, and DRONEY, *Circuit Judges.*

28
29 -----

30
31 Appeal from an order of the United States District Court for the Southern District of New
32 York (Griesa, J.) granting summary judgment to American Home Assurance Company
33 (“American Home”) on the ground that the attachment point for its excess insurance policies
34 could not be reached by the alleged environmental damage at Olin Corporation’s (“Olin”) site at
35 Morgan Hill, California. We hold that the plain language of Olin’s policies with American Home
36 requires American Home to indemnify Olin for that damage. Accordingly, the judgment of the
37 district court is VACATED and the case is REMANDED for further proceedings.

38
39 -----

1 CRAIG C. MARTIN, Jenner & Block LLP, Chicago, IL, *for* Plaintiff-
2 Appellant.

3
4 MICHAEL H. COHEN, Saiber LLC, Florham Park, NJ, *for* Defendant-
5 Appellee.

6
7 Mary Beth Forshaw, Bryce L. Friedman, Simpson Thacher & Bartlett
8 LLP, New York, NY, *for OneBeacon American Insurance*
9 *Company as amicus curiae in support of Defendant-Appellee.*
10

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12 DRONEY, *Circuit Judge*:

13 Plaintiff-Appellant Olin Corporation (“Olin”) appeals from a grant of summary judgment
14 in favor of Defendant-Appellee American Home Assurance Company (“American Home”) in the
15 United States District Court for the Southern District of New York (Griesa, *J.*). Olin brought this
16 action against its insurers, including American Home, regarding environmental contamination at
17 Olin sites in the United States. This appeal arises from proceedings related to Olin’s Morgan
18 Hill, California, manufacturing site. At issue is whether the \$30.3 million attachment point for
19 American Home’s excess policies for the years 1966-69 and 1969-72 could be reached by the
20 alleged property damage at Morgan Hill.

21 For the reasons that follow, we vacate and remand.

22 **BACKGROUND**

23 This case began in 1984 when Olin brought a diversity action against its insurers seeking
24 indemnification for environmental damage at Olin manufacturing sites throughout the United
25 States.¹ Because each site raised its own factual and legal issues, the district court has addressed

¹This action was originally filed in United States District Court for the District of Columbia but was transferred to the Southern District of New York.

1 coverage on a site-by-site basis. This appeal arises out of the most recent of these site-specific
2 proceedings, concerning contamination at Olin's manufacturing site at Morgan Hill, California,
3 between 1957 and 1987. In the course of this proceeding, the district court granted summary
4 judgment to American Home, which issued two excess policies during this period, on the ground
5 that the attachment point for these excess policies could not be met. That ruling is the basis of
6 the present appeal.

7 **I. Olin's Morgan Hill Site**

8 Olin began manufacturing signal flares at Morgan Hill, California, in 1956.² Olin used
9 the chemical potassium perchlorate ("perchlorate") in the manufacturing process. As part of this
10 process, perchlorate was combined with other chemicals by various means including the use of
11 cement mixers. This produced a large volume of perchlorate dust, which was dispersed
12 throughout the site by wind and foot traffic. Perchlorate powder on the ground was then
13 dissolved by rainfall and carried via run-off into dry wells at the site, where it seeped into the
14 ground, contaminating the water table below the site. Changes in Olin's manufacturing process
15 in the 1970s decreased the volume of perchlorate spilled, but regular spillage appears to have
16 continued in some quantity until at least 1986.

17 Throughout this period, the concentration of perchlorate in the water table below the site
18 increased, generating an underground plume of perchlorate that gradually spread down the
19 valley. This underground plume reached equilibrium in 1987, meaning that the contamination of
20 additional soil or groundwater ceased. By then, the plume extended approximately ten miles

²For the purposes of summary judgment, the excess insurers assumed as true the facts presented by Olin's expert witness, William L. Hall, because the insurers believed they were entitled to summary judgment even on that basis. We will follow the district court in assuming those facts are accurate for the sake of deciding the present appeal.

1 from the site. Olin estimated that it would incur costs of more than \$102 million to fully remedy
2 the damage caused by the underground perchlorate plume.³

3 **II. The American Home Policies**

4 Olin had an insurance program consisting of general commercial liability insurance and
5 layered excess policies. Two excess policies provided by American Home are at issue here:
6 policy number CE351099 and policy number CE355541.⁴ The first of these covers the period of
7 January 1, 1966, to January 1, 1969. The second covers the period of January 1, 1969, to January
8 1, 1972. Each policy covers ten percent of up to \$10 million in damages in excess of \$30.3
9 million for the three-year policy period.⁵ Thus American Home has no coverage obligation
10 unless the damages attributable to one of the policies exceed this \$30.3 million attachment
11 point.⁶ Each policy also “follows form” to lower-level excess policies, which means that it
12 adopts their terms and conditions.

13 The 1969-72 American Home policy follows form to a policy issued by Underwriters at
14 Lloyd’s (“Lloyd’s”). According to the terms of the Lloyd’s policy, American Home is obligated

³These costs include \$50 million Olin has spent to remedy contamination ordered by the California Regional Water Quality Control Board, \$47 million it will spend in the future on such remediation, and \$5.3 million in costs associated with a suit filed by the Santa Clara Valley Water District.

⁴Olin originally sought indemnification under a third American Home policy, CE245707. Olin no longer appears to be pursuing this policy, however, and it is not before us.

⁵The maximum payout on each policy is therefore \$1 million.

⁶Olin’s general commercial liability policy for the relevant periods had a maximum liability of \$300,000. Damages that exceeded this threshold would be covered by the first excess policy. Damages exceeding the liability limit of that first excess policy would implicate the next excess policy, and so on. The American Home policies would be required to indemnify Olin only if a loss exceeded the liability limits of the lower-level policies, which here would require \$30.3 million in damages.

1 to indemnify the Assured for all sums which the Assured shall be obligated to pay
2 by reason of the liability . . . imposed upon the Assured by law . . . for damages,
3 direct or consequential and expenses . . . on account of . . . Property Damage . . .
4 caused by or arising out of each occurrence happening anywhere in the World.
5

6 The Lloyd's policy defines "property damage" as "loss of or direct damage to or destruction of
7 tangible property (other than property owned by the Named Assured)." The policy defines
8 "occurrence" as "an accident or a happening or event or a continuous or repeated exposure to
9 conditions which unexpectedly and unintentionally result in personal injury, property damage or
10 advertising liability during the policy period" and further specifies that "[a]ll such exposure to
11 substantially the same general conditions existing at or emanating from one premises location
12 shall be deemed one occurrence."

13 The Lloyd's policy also contains a Condition C: "Prior Insurance and Non-Cumulation of
14 Liability." This provision, the principal subject of this appeal, states the following:

15 It is agreed that if any loss covered hereunder is also covered in whole or in part
16 under any other excess policy issued to the Assured prior to the inception date
17 hereof, the limit of liability hereon . . . shall be reduced by any amounts due to the
18 Assured on account of such loss under such prior insurance.
19

20 Subject to the foregoing paragraph and to all the other terms and conditions of
21 this Policy, in the event that personal injury or property damage arising out of an
22 occurrence covered hereunder is continuing at the time of termination of this
23 Policy, Underwriters will continue to protect the Assured for Liability in respect
24 of such personal injury or property damage without payment of additional
25 premium.
26

27 The 1966-69 American Home policy follows form to a policy issued by the Home
28 Insurance Company, which in turn mostly follows form to a policy issued by Lloyd's. That
29 Lloyd's policy appears to be identical to the policy underlying the 1969-72 American Home
30 policy in nearly all relevant respects, employing the same definitions of "occurrence" and
31 "property damage" and including an identical Condition C. The difference between the two

1 American Home policies is that the Home Insurance Company policy underlying the 1966-69
2 American Home policy specifies that it only provides coverage for “accidents or occurrences . . .
3 taking place during the period of the Policy.” No such language applies to the 1969-72 American
4 Home policy.⁷

5 **III. Proceedings Related to the Morgan Hill Site**

6 On June 14, 2010, Olin filed a third amended complaint seeking indemnity related to the
7 Morgan Hill site. Olin sought coverage from American Home under its policies. American Home
8 moved for summary judgment, arguing that the \$30.3 million attachment point was not reached
9 for either policy. American Home relied on our decision in *Olin Corp. v. Insurance Co. of North*
10 *America*, 221 F.3d 307 (2d Cir. 2000) (“*Olin I*”), discussed further below, which provides for pro
11 rata allocation of damage in cases of progressive environmental injury. Under this approach, the
12 total \$102 million in damages from the cleanup of the Morgan Hill site should be equally divided
13 among the years in which property damage occurred. And under our decision in *Olin Corp. v.*
14 *Certain Underwriters at Lloyd’s London*, 468 F.3d 120 (2d Cir. 2006) (“*Olin II*”), also discussed
15 further below, property damage occurred from the time when contamination began until the time
16 when the underground plume of perchlorate reached its maximum extent. Assuming that
17 contamination began in 1957 and the plume reached equilibrium in 1987, property damage
18 occurred in thirty-one years. Pursuant to *Olin I* and *Olin II*, the total damage of \$102 million
19 should be divided by 31, yielding a per-year damage figure of \$3.3 million. Since each American

⁷The parties therefore agree that under the 1966-69 policy, an occurrence is only covered if damage and the event causing the damage take place within the policy period. Olin argues that under the 1969-72 policy, only the damage from an event need take place within the policy period in order to be a covered occurrence; the event causing the damage need not. For the reasons stated below, this difference in language does not affect our resolution of this appeal.

1 Home policy had a coverage period of three years, the total property damage attributable to each
2 policy from the perchlorate spill amounted to only \$9.9 million. Thus neither policy's attachment
3 point of \$30.3 million could be reached.

4 Olin did not dispute this basic analysis but argued that American Home had ignored the
5 effect of Condition C on the policies. In Olin's view, the second paragraph of Condition C
6 requires American Home to indemnify Olin not only for damage occurring during the policy
7 periods but also for any damage in subsequent years. This is because property damage arising
8 from a "covered occurrence" was "continuing at the time of termination" of each policy, and
9 thus American Home's liability for the 1966-69 policy includes all damage from 1966 to 1987,
10 and its liability for the 1969-72 policy includes all damage from 1969 to 1987. Using the pro rata
11 approach of *Olin I*, \$72.6 million in damage should be assigned to the 1966-69 policy, and \$62.7
12 million should be assigned to the 1969-72 policy. Since these amounts far exceed the \$30.3
13 million attachment point, each policy would be reached.

14 The district court rendered an oral decision regarding the effect of Condition C, and
15 based on this decision it later granted American Home's motion for summary judgment on
16 Olin's claims. We interpret the district court's decision as turning on the definition of
17 "occurrence." In the district court's view, Condition C covers only damage resulting from an
18 occurrence that takes place within the policy period. The district court appears to have concluded
19 that the actual spilling of perchlorate on the ground was the occurrence here, with each spill of
20 the chemical being a separate occurrence. On this basis, Condition C would only implicate
21 American Home's 1966-69 policy if the perchlorate spilled between 1966 and 1969 caused more
22 than \$30.3 million of the \$102 million total damage, with the same being true for the 1969-72
23 policy regarding spills from 1969 to 1972. The district court thus granted American Home's

1 motion because Olin had failed to raise a triable issue of material fact regarding whether the
2 spills of perchlorate from 1966 to 1969 or 1969 to 1972 were sufficient to cause \$30.3 million in
3 damage. On September 20, 2011, the district court entered final judgment under Rule 54(b) of
4 the Federal Rules of Civil Procedure in favor of American Home. Olin proceeded to trial against
5 the remaining insurers implicated in the Morgan Hill site and settled with the other excess
6 insurers prior to a verdict.⁸ Olin timely appealed the district court's dismissal of its claims
7 against American Home.

8 DISCUSSION

9 We review *de novo* a district court's grant of summary judgment. *Kaytor v. Elec. Boat*
10 *Corp.*, 609 F.3d 537, 546 (2d Cir. 2010). Summary judgment may be granted only where "there
11 is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
12 law." Fed. R. Civ. P. 56(a). In making this determination, a court should "draw all reasonable
13 inferences in favor of the nonmoving party, and it may not make credibility determinations or
14 weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

15 I. This Court's Prior *Olin* Decisions

16 Two of our decisions involving other Olin sites are central to the issues of this case. *Olin*
17 *I*, 221 F.3d 307, involved the allocation of damages related to an Olin fertilizer plant in
18 Williamston, North Carolina. Olin produced pesticides at that site from 1950 to 1967. *Id.* at 311-
19 12. Nearly two decades later, substantial contamination of the soil and groundwater of the site
20 was discovered, requiring Olin to incur more than \$4 million in cleanup costs. *Id.* at 313. At trial,

⁸Amicus OneBeacon American Insurance Company ("OneBeacon"), whose interest in this case is discussed further below, was one of the excess insurers that settled with Olin regarding Olin's Morgan Hill site.

1 the jury found injury to property at the Williamston site from 1951 through 1985, raising the
2 issue of how the total damages should be allocated under New York law to the various insurance
3 policies in effect during this thirty-five year period. Olin argued for the joint and several
4 approach, in which Olin could select a particular year during the period of damage, collect
5 damages up to the policy limits from the policies in effect that year, and the selected insurers
6 could then seek contribution from other policies in effect during other years of the loss period.
7 *Id.* at 322. The insurers argued that liability should be allocated among the policies according to
8 “some objective factor.” *Id.* Finding the language of the policies “inconclusive” on this question,
9 we turned to public policy and equitable considerations and found these to “clearly indicate
10 allocation” as the correct methodology. *Id.* at 324. Because the evidence in the case provided no
11 basis on which to allocate liability for damages to any particular year or period, we affirmed the
12 district court’s decision to allocate damages equally to each year in which the jury found damage
13 had occurred. *Id.* at 325, 327. The New York Court of Appeals subsequently confirmed our
14 prediction of New York law on this point, holding that in the absence of contractual language to
15 the contrary, courts should use the pro rata approach to allocating liability for damages in cases
16 of progressive environmental injury under these circumstances. *Consol. Edison Co. of N.Y. v.*
17 *Allstate Ins. Co.*, 774 N.E.2d 687, 695 (N.Y. 2002).

18 Our second decision is *Olin II*, 468 F.3d 120. That case involved four Olin sites near
19 Niagara Falls, New York. *Id.* at 123. As in the present case, chemical spills at these sites
20 contaminated the soil, and subsequent groundwater flows spread this contamination. The
21 contamination was not discovered for decades. When it was discovered, Olin incurred substantial

1 cleanup costs, which it sought to recover from some of the very same policies involved here.⁹
2 We began by reaffirming our holding in *Olin I* that in cases when “continuous property damage
3 takes place over a number of policy periods, the liability for that injury is allocated over the time
4 during which property damage occurred.” *Id.* at 126. We also clarified that equally allocating
5 damage pro rata is a default rule; if the evidence allows for more specific assignment of liability
6 to particular years, then responsibility should be determined in that way. *Id.* at 127. The primary
7 issue of *Olin II*, however, concerned the definition of “property damage.” Given that *Olin I*
8 requires damage to be allocated equally among all years in which property damage occurred, the
9 question of *Olin II* was whether “property damage” occurred only in those years in which “active
10 pollution” took place—that is, “the placing of pollutants at a source where they will leach into the
11 environment”—or whether property damage also occurred in those years when groundwater
12 spread already spilled pollutants into new areas. *Id.* at 129. Because the insurance contracts did
13 not adequately define “property damage,” we held that New York courts would likely conclude
14 that “property damage occurs as long as contamination continues to increase or spread, whether
15 or not the contamination is based on active pollution or the passive migration of contamination
16 into the soil and groundwater.” *Id.* at 131.

17 The effect of these two decisions on the instant case is clear. Under *Olin I*, in the absence
18 of contractual provisions to the contrary or evidence indicating that ascertainable amounts of
19 damage occurred in certain years, the \$102 million in property damage in this case should be

⁹The 1966-69 American Home policy follows form to a Home Insurance policy that follows form to one of the Lloyd’s policies against which Olin sought recovery in *Olin II*. This Lloyd’s policy is the ultimate source of Condition C in the 1966-69 American Home policy. The Lloyd’s policy underlying the 1969-72 American Home policy is identical in all relevant respects to the Lloyd’s policy implicated in *Olin II*.

1 allocated equally to each year in which the property damage occurred. And under *Olin II*,
2 property damage occurred from the time when perchlorate contamination first began until the
3 time when this contamination reached its maximum extent through the spread of the
4 underground plume in the water table.¹⁰ Here, the parties assumed for the purposes of summary
5 judgment that contamination began in 1957 and that the plume reached equilibrium in 1987.
6 Thus under *Olin II*, “property damage” occurred in those 31 years. Dividing the total damage of
7 \$102 million by the 31 years in which damage occurred, \$3.3 million in damage should be
8 allocated to each year between 1957 to 1987.¹¹ This, however, does not resolve the principal
9 issue of this appeal. *Olin I* and *Olin II* were based, in part, on the specific language of the
10 insurance contracts at issue there. Olin contends that Condition C in the two policies here
11 obligates American Home to indemnify it not only for the damage occurring within the three
12 years of each policy, but also for damage that continued after the policies had terminated until
13 the plume reached equilibrium in 1987.

14 **II. Law of the Case, Estoppel, and Waiver**

15 Before considering the effect of Condition C, we first must decide whether Olin is
16 permitted to raise it as a basis for indemnification. American Home argues that the law of the
17 case doctrine prevents Olin from making its Condition C argument because we previously
18 decided how liability for damage for progressive environmental injury should be allocated across

¹⁰Because the insurance contracts in *Olin II* employed the same definition of “property damage” as the contracts here, we see no reason why the spread of the plume of perchlorate should not be deemed “property damage” under the American Home policies.

¹¹This, of course, is merely the result of the record relied upon by the district court in granting summary judgment and not a factual finding regarding the actual damage.

1 multiple policies in *Olin I* and *Olin II*, and Condition C was present in some of those policies.¹²

2 At oral argument, however, counsel for American Home conceded that the interpretation of
3 Condition C was never raised or decided in those cases before either this Court or the district
4 court. As such, the law of the case doctrine is no bar to considering Olin's Condition C
5 arguments. See *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het*
6 *Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 44-45 (2d Cir. 2005).

7 Amicus OneBeacon¹³ argues that Olin is collaterally estopped from raising Condition C,
8 but this argument is also unavailing. Collateral estoppel only prevents relitigation in a
9 subsequent action of "an issue of law or fact actually litigated and decided by a court of
10 competent jurisdiction in a prior action." *Ali v. Mukasey*, 529 F.3d 478, 489 (2d Cir. 2008)
11 (internal quotation marks and emphasis omitted). Because the meaning of Condition C was not
12 "actually litigated and decided" in our previous opinions, collateral estoppel does not apply.

13 The estoppel claim raised by American Home and OneBeacon could also be framed as a
14 waiver issue. However, the district court expressly found that Olin had not waived its argument
15 regarding Condition C by failing to raise it earlier, because the effect of Condition C was not an

¹²As mentioned above, *Olin II* involved, among others, the same Lloyd's policy whose form the 1966-69 American Home policy follows.

¹³OneBeacon issued at least nine high-level excess policies to Olin. Olin sought to recover from some of these policies for the damage at Morgan Hill. The district court dismissed some of Olin's claims against OneBeacon when it granted summary judgment to American Home. Olin and OneBeacon settled the remaining claims before trial. In its notice of appeal, Olin designated only American Home and itself as the parties to this appeal. Thus OneBeacon is not an appellee in the present action. However, some of OneBeacon's policies follow form to the same policies underlying the American Home policies. As a result, they contain Condition C. This means that our interpretation of Condition C may affect OneBeacon's liability to Olin regarding other Olin sites. Because of this, OneBeacon moved to amend the caption to include it as an appellee and, in the alternative, for leave to file an amicus brief. On April 3, 2012, we denied OneBeacon's motion to amend the caption but granted its motion to file an amicus brief.

1 issue in earlier proceedings involving other Olin sites. A district court's determination that a
2 party has not waived an argument by raising it earlier is reviewed for abuse of discretion. *Saybolt*
3 *Int'l*, 407 F.3d at 45. Neither American Home nor OneBeacon has shown that the district court
4 abused its discretion in finding no waiver. *See id.* At 45-46. For these reasons, we see no merit to
5 the contention that we are unable to consider the proper interpretation of Condition C, and we
6 now turn to that question.

7 **III. Relevant Principles of New York Contract Interpretation**

8 Under New York law,¹⁴ insurance policies are interpreted according to general rules of
9 contract interpretation. *E.g.*, *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d
10 154, 183-84 (2d Cir. 2003), *abrogated on other grounds*, *Wachovia Bank v. Schmidt*, 546 U.S.
11 303 (2006). Two of these rules are particularly relevant here. First, the "words and phrases [in a
12 contract] should be given their plain meaning, and the contract should be construed so as to give
13 full meaning and effect to all of its provisions." *LaSalle Bank Nat'l Ass'n v. Nomura Asset*
14 *Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) (internal quotation marks and ellipsis omitted).
15 Any interpretation of a contract that "has the effect of rendering at least one clause superfluous
16 or meaningless . . . is not preferred and will be avoided if possible." *Id.* (citation omitted).

17 Second, contract terms are ambiguous if they are

18 capable of more than one meaning when viewed objectively by a reasonably
19 intelligent person who has examined the context of the entire integrated
20 agreement and who is cognizant of the customs, practices, usages and
21 terminology as generally understood in the particular trade or business.

22
23 *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996) (citation
24 omitted). If a court concludes a provision in an insurance contract is ambiguous, it may consider

¹⁴The parties agree that New York law applies.

1 extrinsic evidence to ascertain the parties' intent at the formation of the contract. *JA Apparel*
2 *Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009). If the extrinsic evidence fails to establish the
3 parties' intent, courts may apply other rules of contract interpretation, including New York's rule
4 of *contra proferentem*, according to which ambiguity should be resolved in favor of the insured.
5 See *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 697-98 (2d Cir. 1998). Ambiguity is
6 absent where the contract's language provides "a definite and precise meaning, unattended by
7 danger of misconception in the purport of the contract itself, and concerning which there is no
8 reasonable basis for a difference of opinion." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d
9 1274, 1277 (2d Cir. 1989) (internal quotation marks and alteration omitted). "Language whose
10 meaning is otherwise plain does not become ambiguous merely because the parties urge different
11 interpretations in the litigation." *Id.* An unambiguous provision of the contract should be given
12 its "plain and ordinary meaning" and the contract should be construed without reference to
13 extrinsic evidence. *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's,*
14 *London*, 136 F.3d 82, 86 (2d Cir. 1998). With these principles in mind, we turn to Condition C.

15 **IV. Condition C**

16 Condition C, the full text of which is quoted above, appears in both of the relevant
17 American Home policies through their following form with the underlying Lloyd's policies.¹⁵ It
18 consists of two paragraphs. We will refer to the first paragraph of Condition C as the "prior

¹⁵Condition C was apparently written by Lloyd's underwriters in 1960 when Lloyd's adopted an "occurrence"-based form in place of an "accident"-based form. The provision's purpose was to "thwart" policyholders from attempting to obtain double recovery when the triggering event occurred while an accident-based policy was in effect but the injury did not manifest until an occurrence-based policy was in effect. See Christopher C. French, *The "Non-Cumulation Clause": An "Other Insurance" Clause by Another Name*, 60 U. Kan. L. Rev. 375, 386-87 (2011).

1 insurance provision” and the second as the “continuing coverage provision.” It is the application
2 of this second provision that is the primary issue here. It provides:

3 Subject to the [prior insurance provision] and to all the other terms and conditions
4 of this Policy, in the event that personal injury or property damage arising out of
5 an occurrence covered hereunder is continuing at the time of termination of this
6 Policy, Underwriters will continue to protect the Assured for Liability in respect
7 of such personal injury or property damage without payment of additional
8 premium.
9

10 By virtue of its plain language, we see three requirements for the application of the
11 continuing coverage provision. First, there must be “personal injury or property damage.”
12 Second, this personal injury or property damage must “aris[e] out of an occurrence covered” by
13 the policy. And third, this personal injury or property damage must be “continuing at the time of
14 termination” of the policy. When these three conditions are met, the plain language of the
15 provision requires the insurer to indemnify the insured for personal injury or property damage
16 continuing after the termination of the policy. We conclude that all three of these conditions are
17 met.

18 First, “property damage” occurred during both the 1966-69 and the 1969-72 coverage periods.
19 This conclusion follows from *Olin II*, which held that the spread of earlier contamination met the
20 definition of property damage in the same policies at issue here. The parties have assumed for
21 the purpose of summary judgment that the perchlorate plume began in 1957 and reached
22 equilibrium in 1987. No evidence was presented suggesting that the plume did not expand
23 between 1966 and 1972. Thus we presume that the plume was spreading during this period,
24 causing property damage. The parties agree on this point.

25 Second, this property damage arose out of an occurrence covered by both the 1966-69
26 and the 1969-72 policies. The policies define an “occurrence” as “an accident or a happening or

1 event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally
2 result in personal injury, property damage or advertising liability *during the policy period*” and
3 specifies that “[a]ll such exposure to substantially the same general conditions existing at or
4 emanating from one premises location shall be deemed one occurrence” (emphasis added).¹⁶ Olin
5 argues that based on this language, the continuous absorption of perchlorate into the soil and
6 groundwater from 1956 to 1987 is a single, multi-year occurrence. That absorption was a
7 continuous or repeated exposure to conditions that resulted in property damage. And because
8 both the absorption itself and the property damage caused by it took place *during the policy*
9 *period* of both the 1966-69 and 1969-72 policies, it is a covered occurrence for the purposes of
10 each policy.¹⁷ This accords with the plain language of the policy. It also is the correct application

¹⁶It may seem that the continuing coverage provision has only two, not three requirements: a “covered occurrence” and continuing damage. This is so because an event is an “occurrence” only if it causes damage during the policy period, and thus it appears that any event meeting the definition of an “occurrence” will also meet the first requirement of the continuing coverage provision: that there be personal injury or property damage during the policy period. This interpretation, however, ignores an important difference in the language of the policies. An event is also an “occurrence” if it causes *advertising liability* during the policy period. But the continuing coverage provision covers only *personal injury* or *property damage* that begins during the policy and continues after its termination. Thus there is no continuing coverage for advertising liability by the plain terms of the continuing coverage provision. The fact that not all injuries covered by the policy are covered by the continuing coverage provision provides an additional reason why we cannot treat this provision as redundant or superfluous.

¹⁷Olin argues that the 1966-69 policy requires that both the property damage and the happening or event causing the damage take place within the policy period in order to meet the definition of an “occurrence,” while the 1969-72 policy only requires that the property damage take place within the period. We need not consider this issue, however, because the evidence shows that both the property damage and the event that caused it (namely the exposure of the soil and groundwater to perchlorate) took place (in part) during each policy period, and thus a covered occurrence took place for the purposes of each policy.

1 of New York law. *Cf. Appalachian Ins. Co. v. Gen. Elec. Co.*, 863 N.E.2d 994, 1000-01 & n.3
2 (N.Y. 2007); *Ramirez v. Allstate Ins. Co.*, 811 N.Y.S.2d 19, 20 (1st Dep’t 2006).

3 American Home agrees that the perchlorate contamination at Morgan Hill qualifies as a
4 single, multi-year occurrence “for purposes of determining applicability limits of liability and
5 retentions.” However, American Home argues that a single, multi-year occurrence spanning the
6 policy period does not satisfy Condition C. We see no basis in the language of the policy for
7 concluding that “occurrence” in Condition C has a different meaning than “occurrence”
8 elsewhere in the policies. Indeed, the policies rule out such an interpretation by expressly stating
9 that “occurrence” shall have the meaning provided by the policy “wherever used herein.” Thus,
10 if, as American Home concedes, thirty years of constant perchlorate exposure on the same site
11 that through the same process caused property damage by the slow expansion of the plume
12 satisfies the definition of “occurrence” for the purposes of applying other provisions of the
13 policy, it suffices for Condition C. The second requirement of Condition C is therefore met
14 because the property damage discussed above “arose out of” an “occurrence” covered by the
15 policy.

16 The third requirement of Condition C is also met here: the property damage occurring
17 during the policy period was clearly “continuing” at the time of termination of each policy. For
18 the purposes of summary judgment, the parties assumed that the property damage—namely, the
19 spread of the perchlorate plume—began in 1957 and continued until 1987. No evidence was
20 presented that this damage was not “continuing” in 1969 when the first policy expired or that it
21 did not continue until 1987. The same is true for the 1969-72 policy.

1 American Home and amicus OneBeacon argue, however, that the post-policy damage
2 was “new” damage rather than “continuing” damage. Under this view, any additional damage
3 occurring after the policy period is “new” and thus damage “continuing at the time of
4 termination” of the policy means only prior damage that has not been fully remedied when the
5 policy terminates. However, this interpretation deprives Condition C of any effect, since even
6 without Condition C American Home would be obligated to indemnify Olin for damage
7 occurring during the policy period that had not yet been remedied. *See LaSalle Bank*, 424 F.3d at
8 206 (stating that contracts “should be construed so as to give full meaning and effect to all [their]
9 provisions” (internal quotation marks omitted)). We conclude instead that damage “continuing at
10 the time of termination” of the policy clearly contemplates property damage from the migration
11 of chemicals in the expanding groundwater plume during the term of the policy and continuing
12 after the policy terminated. This is consistent with *Olin II*, which characterizes such damage as
13 both “additional” and “continuing.” *See Olin II*, 468 F.3d at 129-30.

14 Because the three requirements of Condition C are met, that provision applies here.
15 American Home thereby could be obligated to indemnify Olin up to the limits of its policies for
16 all property damage caused by the perchlorate plume that occurred during and after the
17 termination of each policy. Since there is not yet any basis for attributing greater or lesser
18 damage to individual years, we follow the district court in allocating \$3.3 million of damage to
19 each year between 1957 and 1987. The 1966-69 policy is thus exposed to twenty-two years of
20 damage, a total of \$72.6 million. The 1969-72 policy is exposed to nineteen years of damage, a
21 total of \$62.7 million. Because each of these figures exceeds the \$30.3 million attachment point,
22 summary judgment was inappropriate.

1 American Home's main argument against applying the plain language of the continuing
2 coverage provision of Condition C is that this result would be contrary to the pro rata allocation
3 rule applied in *Olin I* and *Olin II*. However, those decisions simply provide that when insurance
4 contracts do not adequately define how progressive environmental damage is to be apportioned
5 across multiple triggered policies, and the evidence cannot make that distinction, New York law
6 requires damage to be allocated pro rata. New York law does not preclude parties from
7 contracting to indemnify the insured for damage allocated to years after the termination of the
8 policy. This is precisely what American Home's policies do here with Condition C. American
9 Home has agreed to indemnify Olin not only for damage taking place during the policy period
10 but also continuing after the termination of the policy. The provision thus simply adds additional
11 years of exposure, using the same pro rata allocation method for determining the amount of
12 damage attributed to each year.

13 Some state courts in other jurisdictions interpreting policies containing Condition C have
14 concluded that the language of those policies is "inconsistent" with the pro rata approach and
15 have imposed joint and several liability among triggered policies in cases involving so-called
16 long-tail liability. *See, e.g., Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 493-94 (Del. 2001);
17 *Chi. Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 797 N.E.2d 434, 441-44
18 (Mass. App. Ct. 2003); *Dow Corning Corp. v. Cont'l Cas. Co.*, No. 200143, 1999 WL 33435067,
19 at *6-7 (Mich. Ct. App. Oct. 12, 1999) (per curiam) (unpublished opinion). American Home
20 argues that these decisions support its view that the interpretation of Condition C we adopt here
21 is inconsistent with our pro rata decisions in *Olin I* and *Olin II*. We agree with American Home
22 that New York state court decisions and those prior decisions of this Court endorsing the pro rata
23 approach foreclose us from interpreting Condition C as imposing joint and several liability.

1 However, the decisions from other jurisdictions endorsing joint and several liability did not
2 principally rely on Condition C to reach that outcome. Instead, those decisions relied on
3 language in the policies providing coverage for “all sums which the Assured shall be obligated to
4 pay.” *See, e.g., Hercules*, 784 A.2d at 489-90, 493-94. This same “all sums” language appears in
5 the American Home policies, but both this Court in *Olin I* and the New York Court of Appeals in
6 *Consolidated Edison* have expressly rejected the conclusion that such language requires joint
7 and several allocation of damages and instead have endorsed the pro rata allocation method for
8 policies with that language. *See Olin I*, 221 F.3d at 323-24; *Consol. Edison*, 774 N.E.2d at 695.
9 Thus the only difference in language between the American Home policies here and the
10 provisions of the policies considered by the *Olin I* and *Consolidated Edison* courts is Condition
11 C.¹⁸ That is not enough to impose joint and several liability and reject pro rata allocation, given
12 that the continuing coverage provision of Condition C applies only to damages continuing *after*
13 the termination of the policy and is silent regarding damages occurring *before* the policy period.
14 Thus Condition C alone cannot trigger joint and several liability in lieu of the pro rata allocation
15 methodology employed in *Olin I* and *Consolidated Edison*.

16 Our prior holdings regarding pro rata allocation and those of the New York state courts
17 call for us to endorse the pro rata allocation method and allocate \$3.3 million in damage to each
18 year from 1957 to 1987. But the plain language of the continuing coverage provision of
19 Condition C extends liability *temporally* by providing that the insurer will cover damage
20 allocated pro rata to years after the termination of the policy if that damage (1) is “continuing” at

¹⁸These cases, particularly *Consolidated Edison*, concerned damage over extended periods of time. It may be that some of the policies implicated in these cases did in fact contain Condition C, but if so, the parties never raised it and those decisions did not discuss it.

1 the time of the policy's termination and (2) arises from an occurrence covered by the policy.
2 Thus the continuing coverage provision of the 1966-69 policy applies to all damage allocated to
3 the years 1966 until the time when property damage ceases (here 1987). The same is true of the
4 1969-72 policy for the period of 1969-1987. We believe that this interpretation best harmonizes
5 the plain language of Condition C with the holdings of our Court involving similar policies.¹⁹ We
6 also believe this honors the intent of the parties, because declining to enforce the continuing
7 coverage provision of Condition C while allocating damages pro rata may excuse high-level
8 excess insurers from providing coverage paid for by their insureds. Allocating damages over a
9 lengthy period typically results in attachment points for certain excess policies not being
10 reached. Giving effect to the plain language of Condition C thus allows insureds to look to
11 excess policies for some indemnification when those policies include Condition C.

12 American Home argues that this interpretation of Condition C would produce a result
13 inconsistent with the other terms of the policies. Specifically, the 1966-69 policy (with the
14 application of Condition C) covers property damage from the perchlorate plume for the period of
15 1966 to 1987. This would be anomalous, it is argued, because perchlorate continued to be spilled
16 at the site into the mid-1980s. Thus under the 1966-69 policy, Olin could potentially recover for
17 property damage occurring in 1985 that was contributed to by chemicals spilled in 1982, making
18 American Home liable for the release of chemicals that occurred long after the policy had
19 terminated. However, this result follows not from our interpretation of whether the damage is

¹⁹Because Condition C is unambiguous, we do not consider extrinsic evidence in interpreting the provision, *see Alexander*, 136 F.3d at 86, nor do we apply the rule of *contra proferentem*. We observe, however, that if the meaning of Condition C *were* unclear and the extrinsic evidence did not resolve the ambiguity, we would be required to construe the provision against the insurer.

1 “continuing” but rather from the fact that the American Home policies define the constant, three-
2 decade-long exposure of the soil and groundwater to perchlorate dust as one, multi-year
3 occurrence, as well as from the holding of *Olin II* that the spread of the perchlorate plume is
4 property damage.

5 We now turn to the final issue: how the “prior insurance” provision of Condition C
6 applies to the two American Home policies. American Home contends that this provision
7 prevents it from having any responsibility under either policy, because the damage caused by the
8 perchlorate spill is covered “in whole or in part” by Olin’s other policies, namely policies that
9 provided coverage before the dates of the American Home policies. Olin has already recovered
10 from some of these policies, but at levels below the American Home policies’ attachment point.
11 Olin argues that American Home misreads the prior insurance provision, which applies only to
12 policies that are (1) provided by the same insurer (2) at the same level of coverage. Since Olin
13 had no coverage at the \$30.3 million level provided by American Home before the 1966-69
14 American Home policy, these conditions are not met. But Olin concedes that the prior insurance
15 provision of Condition C does apply to the 1969-72 American Home policy, because the 1966-
16 69 policy meets these two conditions. Olin therefore argues that the most it can recover from the
17 two policies is \$1 million, since Olin’s recovery from the 1969-72 policy is reduced by the
18 amount it recovers from the 1966-69 policy via the operation of the prior insurance provision.

19 We agree with Olin that the prior insurance provision does not apply to prior insurance
20 policies at a lower level of excess coverage. An excess insurance policy, such as the American
21 Home policies here, is not triggered unless the coverage limits of lower-level policies have first
22 been exhausted. Reducing American Home’s liability on an excess policy at the \$30.3 million
23 level because of damages paid by a policy, for example, at the \$20 million level would conflict

1 with the terms of the higher-level excess policy, since the intent of purchasing insurance at the
2 \$30.3 million level is to be indemnified only when lower-level policies are unable to fully
3 indemnify a particular loss and the total damages reach that higher-level policy's attachment
4 point. American Home's \$30.3 million excess policy insures against a different loss than an
5 excess policy at the \$20 million level: a loss in excess of \$30.3 million. Thus we conclude that
6 the prior insurance provision reduces American Home's liability only to the extent that a prior
7 insurance policy at the same level of coverage, here \$30.3 million, indemnifies for a loss that is
8 also covered by an American Home policy. This accords with Condition C's apparent purpose of
9 sweeping a continuing loss into the earliest triggered policy, with that policy then fully
10 indemnifying the insured for that loss.²⁰ As a result, only one of the American Home policies
11 here indemnifies Olin.

12 Based on this interpretation of the prior insurance provision, the most Olin can recover
13 from the two American Home policies is the policy limit of one policy, \$1 million. The record
14 before the district court established that Olin did not have any insurance at the \$30.3 million
15 level until the 1966-69 policy. Because no prior policy exists from which Olin could recover
16 damages in excess of \$30.3 million, Olin's recovery from the 1966-69 policy cannot be reduced

²⁰We acknowledge that courts typically do not enforce the similar "other insurance" provision in pro rata jurisdictions, because enforcing it gives insurers a "double credit": the pro rata methodology allocates only a portion of the total loss to each insurer, but enforcing an "other insurance" provision would then allow insurers to reduce their liability for their portion of the loss to the extent another insurer pays damages for that insurer's portion of the loss. *See, e.g., Spaulding Composites Co. v. Aetna Cas. & Sur. Co.*, 819 A.2d 410, 422 (N.J. 2003); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740, 750 (Ill. App. Ct. 1996). This rule is not applicable here, however, because the continuing coverage provision is expressly limited by the prior insurance provision. Thus, to the extent the continuing coverage provision expands an insurer's liability, it does so subject to the limitations of the prior insurance provision. We therefore cannot give effect to the continuing coverage provision while disregarding the prior insurance provision, but we instead must give effect to both parts of Condition C.

1 by its recovery under any other policy.²¹ Since the 1966-69 policy is at the same \$30.3 million
2 level as the 1969-72 policy, though, any amount Olin recovers from the former reduces its
3 recovery under the latter according to the terms of the prior insurance provision.

4 **V. Proceedings on Remand**

5 For the reasons stated above, we conclude that the district court's basis for granting
6 summary judgment was in error. Condition C obligates American Home to indemnify Olin not
7 only for property damage occurring during the policy period, but also for property damage
8 arising from covered occurrences that continues after the policy period. Three decades of
9 perchlorate exposure and the damage it created are treated as a single, multi-year occurrence for
10 the purposes of this policy. And because this single, multi-year occurrence took place in part
11 during each of the two policy periods here, the district court was incorrect to conclude that
12 neither policy would be reached because of the allocation method. On the record before the
13 district court, \$72.6 million in damage falls within the coverage of the 1966-69 policy, while
14 \$62.7 million falls within the coverage of the 1969-72 policy. These figures exceed the
15 American Home policies' \$30.3 million attachment points.

16 On remand, American Home may demonstrate that these attachment points cannot be
17 reached for other reasons. For example, this estimate of the years in which property damage
18 occurred may be inaccurate. Or the evidence may permit the court to assign greater damage to
19 the years before the inception of the two policies. We decide only that issues of material fact
20 remain regarding American Home's liability.

²¹We need not address Olin's contention that the prior insurance provision applies only to a prior policy from the same insurer, as no previous policies issued by insurers other than American Home had attachment points at the same level as the American Home policies.

1

CONCLUSION

2

For the foregoing reasons, we VACATE the district court's grant of summary judgment

3

to the defendant and REMAND for further proceedings.