

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE,

Plaintiff,

v.

MARSH USA INC.,

Defendant.

Civil Action No. 23-2406

2023 OCT 25 A 8:30
JAMES F. FOLEY III
VOTING CLERK / ASSISTANT
SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE

COMPLAINT

Plaintiff President and Fellows of Harvard College (“Harvard”), as and for its Complaint against Defendant Marsh USA Inc. (“Marsh”), alleges as follows:

NATURE OF THE ACTION

1. Harvard engaged Marsh to serve as its insurance broker and to provide insurance claims-related services. Harvard brings this professional malpractice action against Marsh for its breach of both contractual duties and the professional standard of care that it owed to Harvard.
2. Marsh undertook the contractual obligation to “prepare loss notices to insurers and notify insurers of claims.” Further, Marsh, as a licensed insurance brokerage, owed a duty to perform its duties in a professional manner that accorded with the applicable standard of care.
3. Notwithstanding Marsh’s contractual and professional obligation to “prepare loss notices to insurers and notify insurers of claims,” Marsh failed to provide notice of a major claim to certain of Harvard’s excess E&O insurers. The result was the denial of coverage of a major

claim by Harvard's excess E&O insurers, based on failure to provide notice as required under that policy.

4. Specifically, Marsh breached its obligations to Harvard by failing to timely report an underlying lawsuit, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation) et al.*, No. 1:14-cv-14176-ADB (the "SFFA Action"), to Zurich American Insurance Company ("Zurich") and other excess insurers under the excess errors and omissions ("E&O") program that Marsh had placed with these insurers.

5. The essential facts are straightforward. Marsh served as the broker with respect to the placement of Harvard's E&O program, including a \$25 million prior policy issued by National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union" or "AIG") (above a \$2.5 million self-insured retention), Zurich's first-layer excess E&O insurance policy providing \$15 million in coverage excess of AIG's \$25 million primary policy, and additional higher-level coverage.

6. When the SFFA Action was filed on November 17, 2014, Harvard informed Marsh of the SFFA Action and asked that it be reported to AIG. This instruction triggered Marsh's contractual and professional obligation to exercise and act upon its independent judgment as to which insurers should be placed on immediate notice and to then place those insurers on notice.

7. Marsh reported the SFFA Action to the primary insurer, AIG, who accepted coverage of the claim and has been paying the defense costs, fees, and expenses incurred by Harvard with respect to the SFFA claim. It is expected that the limits of the AIG Primary Policy will soon be exhausted, if they have not already been exhausted.

8. Unbeknownst to Harvard and contrary to its contractual and professional obligations, Marsh did not report the SFFA Action to Zurich in November 2014 or at any time

prior to the expiration of the required period for providing notice under the Zurich policy and possibly other excess policies.

9. Harvard did not discover Marsh's failure to place Zurich on notice of the SFFA claim until May 2017. Upon Harvard's discovery of Marsh's failure to report the SFFA Action to Zurich, Marsh formally reported it to Zurich and Harvard's other excess E&O insurers.

10. On October 25, 2017, Zurich denied coverage to Harvard, based solely on the failure to provide timely notice under the terms of the Zurich policy. In subsequent litigation between Harvard and Zurich, the United States District Court for Massachusetts and the United States Court of Appeals for the First Circuit upheld Zurich's denial of coverage based on late notice.

11. Harvard has incurred and continues to incur SFFA Action-related defense costs, fees, and expenses, and those amounts have already or will soon exceed the Zurich policy's \$27.5 million attachment point. As a result of Zurich's successful denial of coverage, Harvard has now lost the ability to access the Zurich policy's \$15 million policy limits for payment of SFFA Action-related costs in excess of the AIG Primary Policy. Zurich's denial of coverage also caused Harvard to incur foreseeable legal expenses to assess options and ultimately to pursue Zurich for coverage, beginning in April 2020 when Harvard first expended sums on outside counsel to determine the propriety of Zurich's denial of coverage.

12. These losses are the proximate result of Marsh's failure to exercise its contractual and professional obligations to exercise independent professional judgment and to provide notice to the entire E&O tower at the outset of the claim as well as during the progression of the claim, when Marsh received additional information indicating the substantial scope, seriousness, and costliness of the SFFA Action.

13. Harvard accordingly seeks damages from Marsh for breach of contract and for tortious violation of the professional standard of care that has resulted in Harvard's loss of access to its excess insurance coverage for the defense costs and other SFFA Action-related expenses incurred in excess of the \$27.5 million attachment point of Zurich's first-layer excess policy (including amounts, if any, that reach into higher-layer policies that may be subject to late-notice defenses similar to that raised by Zurich).

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this Complaint pursuant to Mass. Gen. Laws c. 231A § 1, c. 212 § 4, and c. 223A § 3, because there is an actual controversy within the Court's jurisdiction that merits relief.

15. Venue is proper in this County under Mass. Gen. Law c. 223 § 1 because Marsh is a non-resident party with a place of business in this County, and because Harvard's usual place of business is located in both Middlesex County and Suffolk County.

PARTIES

16. Plaintiff President and Fellows of Harvard College is the legal entity comprising Harvard University, the nation's oldest institute of higher learning, with its campus and facilities located in Cambridge and Boston, Massachusetts. Plaintiff is a Massachusetts not-for-profit corporation. Harvard College is the undergraduate college of Harvard University.

17. Upon information and belief, Defendant Marsh USA Inc. is a Delaware corporation with its principal place of business in the State of New York. Upon information and belief, Marsh maintains an office at 99 High Street, Boston, Massachusetts, and the personnel working on Harvard's account worked out of that Boston office. Upon information and belief, the contract to provide insurance brokerage and risk management consulting services to Harvard was created and

signed by Marsh at its Boston office, and the parties expected that contract to be performed primarily and substantially in Massachusetts.

FACTUAL BACKGROUND

A. Harvard's Relationship and Contract with Marsh

18. Marsh has served as an insurance broker and risk management consultant for Harvard for over a decade.

19. Marsh provided specific assurances that Marsh would bring their decades of experience to bear with respect to exercising independent professional judgment, advising Harvard, and acting upon its independent professional judgment with respect to matters within the scope of its engagement with Harvard, including Marsh's duty to ensure that adequate and timely notice was provided with respect to matters triggering claims-made coverages such as the E&O and D&O coverages procured by Marsh.

20. Marsh and Harvard entered into a series of written broker agreements, including an agreement effective for the period July 1, 2014 through June 30, 2015 (the "Broker Agreement"). A true and correct copy of the Broker Agreement is annexed hereto as Exhibit A.

21. On July 18, 2014, Marsh provided Harvard with the Broker Agreement setting forth Marsh's obligations as Harvard's insurance broker and risk management consultant for the several lines of coverage, including the so-called "Blended Program / Package" that included the E&O insurance program placed by Marsh and including the above-referenced AIG Primary Policy and the above-referenced Zurich first-layer excess E&O policy.

22. Pursuant to the terms of the Broker Agreement, Marsh agreed to provide certain services for a one-year period, effective as of July 1, 2014, and subject to extension in writing. Ex. A (Broker Agreement) at 1, § 3.

23. The Broker Agreement states that “Marsh will act as [Harvard’s] insurance broker and/or risk management consultant with respect to the lines of insurance listed in the attached letter,” and it further states that Marsh will provide certain services for Harvard in those roles. Ex. A (Broker Agreement) at § 1.

24. The services that Harvard engaged Marsh to provide encompassed, *inter alia*, “Claims-Related Services,” which includes timely and adequate notification of claims to the insurers, including AIG and Zurich, from whom Marsh procured coverage for Harvard.

25. More specifically, the Broker Agreement states that Marsh will provide the following “Claims-Related Services” (“you” refers to Harvard):

- Evaluate coverage applicability on all Marsh placed business
- Assist you in the development of settlement strategies
- Assist you with insurer negotiations
- Assist you with litigation management issues that impact claim settlements
- Excluding Workers Compensation, Primary Auto Liability / Physical Damage and non-complex Primary General Liability claims, **prepare loss notices to insurers and notify insurers of claims; provided that your Marsh claims advocate is informed in writing by you of the claim, with details of the claim, and Marsh has placed the applicable policies** or the Marsh claims advocate has been provided written notice by you of the applicable carrier and policies.

Ex. A (Broker Agreement) at § 1(p) (emphasis added).

B. Harvard’s E&O Insurance Program

26. Marsh was the broker responsible for the placement of Harvard’s E&O insurance program, including the policies purchased from AIG and Zurich.

27. Marsh brokered AIG’s sale to Harvard of a primary-layer Educational Institution Risk Protector liability insurance policy, Policy No. 01-817-25-28, with the policy period of November 1, 2014 to November 1, 2015 (the “AIG Primary Policy”). A true and correct copy of the AIG Primary Policy is annexed hereto as Exhibit B.

28. The AIG Primary Policy includes a \$25 million aggregate Limit of Liability, subject to a \$2.5 million self-insured retention. The AIG Primary Policy also provides coverage for defense costs within the Policy's aggregate limits, which means that the payment of defense costs erodes the aggregate limits of the AIG Primary Policy.

29. The AIG Primary Policy's notice / reporting section states, *inter alia*:

The Insureds shall, as a condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of any Claim made against an Insured, a Crisis Management Event or Privacy Event or Security Failure or Security Threat as soon as practicable after: (i) the Named Entity's Risk Manager or General Counsel (or equivalent position) first receives notice of the Claim; (ii) the Crisis Management Event commences, or (iii) solely for the purposes of the Event Management Insuring Agreement and Cyber Extortion Insuring Agreement, the Privacy Event, Security Failure or Security Threat commences.

Notwithstanding the foregoing, the Insured shall not be required to give written notice of a Claim until the earliest occurrence of the following:

(i) the Claim is or is sought to be certified as a class action; or

(ii) total Loss (including Defense Costs) of the Claim is reasonably estimated by the Organization's General Counsel or Risk Manager (or equivalent position) to exceed 50% of the applicable retention amount for such Claim;

provided, however, that in all events, all Claims, including Claims described in (i) - (ii) above, must be reported to the Insurer no later than ninety (90) days after the end of the Policy Period or the Discovery Period (if applicable).

Ex. B (AIG Primary Policy) at 58 (emphasis in original).

30. Marsh also procured from Zurich an Excess Select Insurance Policy, Policy Number IPR 3792308-03, with the policy period of November 1, 2014 to November 1, 2015 (the "Zurich Policy"). A true and correct copy of the Zurich Policy is annexed hereto as Exhibit C.

31. The Zurich Policy includes an aggregate limit of liability of \$15,000,000 for defense and indemnity costs.

32. The Zurich Policy “follows form” to the AIG Primary Policy, meaning that claims covered by the AIG Primary Policy will also be covered under the Zurich Policy unless some unique term or condition of the Zurich Policy provides otherwise. The Zurich Policy attaches once Harvard or AIG has paid \$27.5 million on a covered claim, including satisfaction of the AIG Primary Policy’s \$2.5 million retention.

33. The Zurich Policy’s Insuring Clause states in pertinent part:

Coverage under this policy shall attach only after:

A. all the Limits of Liability of the **Underlying Insurance** have been exhausted solely as a result of the actual payment of covered loss(es); or

B. the **Policyholder** and/or any other insurer(s), entity, or individual on behalf of the **Policyholder** has paid up to the full limits of liability for such loss, and satisfied any deductible(s) or retention amount(s) of the **Underlying Insurance** on behalf of the insurer(s) of any **Underlying Insurance**, including coverage provided pursuant to a difference in conditions policy.

Coverage under this policy shall then apply in conformance with and subject to the warranties, if permitted, limitations, conditions, provisions, and other terms of the Followed Policy, together with the warranties, if permitted, and limitations of any other Underlying Insurance. In no event shall coverage under this policy be broader than coverage under any Underlying Insurance.

Ex. C, Form U-FLXS-100-A CW, at ¶ I.

34. The Zurich Policy contains conditions related to reporting and notice, specifically:

Reporting and Notice—As a condition precedent to exercising any rights under this policy, the Policyholder shall give the Underwriter written notice of any claim or any potential claim under this policy or any Underlying Insurance in the same manner required by the terms and conditions of the Followed Policy. Notwithstanding the foregoing, notice to the insurer(s) of the Followed Policy or other Underlying Insurance does not constitute notice to the Underwriter. Written notice of any claim or potential claim shall be provided to the Underwriter at the address set forth in Item 5.A. of the Declarations.

Ex. C, Form U-FLXS-100-A CW at ¶III.A.

35. The Zurich Policy specifies the AIG Primary Policy as the “Underlying Insurance” and the “Followed Policy.”

C. The SFFA Claim

36. Upon information and belief, non-party Students for Fair Admissions, Inc. (“SFFA”) is an organization with a stated mission to support and participate in litigation concerning the use of race in college admissions programs.

37. On November 17, 2014, SFFA filed a complaint against Harvard in the United States District Court for the District of Massachusetts.

38. SFFA’s complaint generally alleged that Harvard College administered its student admissions plan and process in violation of Title VI.

39. The SFFA complaint asserted the following causes of action: (1) Violation of 42 U.S.C. § 2000 (Intentional Discrimination Against Asian Americans); (2) Violation of 42 U.S.C. § 2000 (Racial Balancing); (3) Violation of 42 U.S.C. § 2000 (Failure To Use Race Merely as a “Plus” Factor in Admissions Decisions); (4) Violation of 42 U.S.C. § 2000 (Failure to Use Race to Merely Fill the Last “Few Places” in the Incoming Freshman Class); (5) Violation of 42 U.S.C. § 2000 (Race-Neutral Alternatives); and (6) Violation of 42 U.S.C. § 2000 (Any Use of Race as a Factor in Admissions).

40. The SFFA Action required Harvard to engage in extensive pre-trial discovery and motion practice. Trial of the case was conducted over a three-week period in the United States District Court for the District of Massachusetts. Judgment was entered in favor of Harvard on all counts, and SFFA appealed the judgment to the United States Court of Appeals for the First Circuit. On November 12, 2020, the First Circuit ruled in favor of Harvard and upheld the District Court’s decision.

41. On February 25, 2021, SFFA filed a petition for *certiorari* to the Supreme Court of the United States. The Supreme Court granted SFFA's petition for *certiorari* and held oral argument on October 31, 2022. The Supreme Court issued its ruling on June 29, 2023. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

42. In September 2017, the Department of Justice informed Harvard that it was opening an investigation of Harvard College's admissions practices.

43. In connection with that investigation, Harvard produced to DOJ more than 100,000 pages of documents. That investigation is still pending.

44. AIG covered the SFFA Action and the DOJ Investigation as a single claim (the "SFFA Claim").

45. Harvard's defense costs associated with the SFFA Claim consist of legal fees and expenses, costs associated with electronic discovery vendors, expert witness and associated fees and court costs.

46. It is expected that the Zurich layer will soon be reached (if it has not already been reached), and the amounts ultimately incurred by Harvard in connection with the SFFA Action may potentially exceed the limits of the Zurich Policy and reach higher excess layers.

D. Initial Notice of the SFFA Action to the Primary E&O Insurer

47. Harvard advised its insurance brokers about the SFFA Action shortly after it was filed and asked them to notify Harvard's primary insurers about the suit so that an insurer-funded defense could be put in place.

48. As it relates to the E&O coverage, on or about November 18, 2014, Harvard sent an email to Marsh regarding the SFFA Action.

49. In that November 18, 2014 email, which attached a copy of the complaint in the SFFA Action, Harvard requested that Marsh report the matter to AIG and for Marsh to provide an analysis as to coverage for the claim.

50. One of the Marsh account representatives with principal responsibility for the Harvard account responded to Harvard stating: "I thought I might be seeing this Complaint from you. I read about it in the paper this morning."

51. AIG accepted coverage for the SFFA Claim under Harvard's primary E&O policy.

52. The receipt of Harvard's instruction to provide notice to even a single insurer triggered Marsh's contractual and professional duties, both as set forth in the broker contract and as inherent in a broker's standard of care generally, to determine which insurers should receive notice of the claim and to then proceed with providing timely and adequate notice to all such insurers.

53. This expectation was born out by the actions of Risk Strategies Company, which at this time served as the broker on Harvard's general liability insurance program. Unlike Marsh, Risk Strategies Company complied with the applicable standard of care by addressing the need to place the entire tower of primary and excess CGL carriers on notice of the SFFA Action, despite the absence of an initial explicit request from Harvard that it do so.

E. Harvard Discovers Marsh's Failure to Report the SFFA Action to Zurich

54. After asking Marsh to report the SFFA Action in November of 2014, Harvard and Marsh exchanged numerous communications regarding the SFFA Claim.

55. Although Marsh continued to provide its broker and risk-management consultant services for Harvard, including in connection with the SFFA Action in 2014 and 2015, Marsh did not inform Harvard that it had not reported the SFFA Action to Zurich, nor did Marsh ever advise Harvard that notice should be provided to Zurich or other excess insurers.

56. Marsh did not give any indication that it had not reported the SFFA Action to Zurich, despite receiving new information as the claim proceeded indicating that the SFFA action would be expensive and long-lasting (and, therefore, much more likely to potentially reach the excess layer). For example, in the spring of 2015—well before the deadline for providing notice to Zurich—Harvard informed Marsh that the claim was complex and expensive and would rapidly erode the \$2.5 million self-insured retention below the AIG Primary Policy. Yet at no time prior to the expiration of the Zurich notice period did Marsh revisit its notice decisions or advise Harvard that notice should be provided to the excess E&O.

57. In May 2017, Harvard contacted Marsh out of an abundance of caution, to inquire if an update should be given to Zurich about the SFFA Action.

58. It was only then that Marsh disclosed that it had not yet reported the SFFA Action to Zurich.

59. Upon learning this, Harvard immediately demanded that Marsh formally report the matter to Zurich and all of Harvard's other excess E&O insurers, which Marsh did by letter dated May 23, 2017.

60. By the time Harvard became aware of Marsh's error and omission, the deadline for providing timely notice to Zurich had long passed, and it was too late to cure the late notice.

F. Zurich's Denial on Late Notice Grounds

61. By letter dated May 25, 2017, Zurich acknowledged receipt from Marsh of the formal notice of the SFFA Action.

62. In an August 30, 2017 letter, Zurich indicated that the SFFA Claim would otherwise be covered under the Zurich Policy, but Zurich reserved the right to deny coverage because "Zurich did not receive notice of it until May 2017." A true and correct copy of the letter is annexed as Exhibit D.

63. By letter dated October 25, 2017, Zurich denied coverage for the SFFA Claim. A true and correct copy of the letter is annexed as Exhibit E.

64. The sole basis of Zurich's denial was that Zurich had received late notice of the SFFA Claim.

65. In late May 2020, Harvard retained the legal services of Anderson Kill P.C. to evaluate the consequences of Marsh's failure to provide timely notice and Zurich's resulting denial of coverage. This was Harvard's first expenditure of resources on outside counsel or advisers in response to Marsh's late notice to the excess D&O tower.

66. In September 2021, Harvard initiated coverage litigation against Zurich in the United States District Court for the District of Massachusetts, seeking coverage for the SFFA Claim and a ruling that Zurich's late notice defense was invalid.

67. On November 2, 2022, the District Court granted summary judgment in favor of Zurich based on Zurich's late notice defense, and it dismissed the coverage litigation.

68. On November 29, 2022, Harvard timely filed its notice of appeal as to that decision to the United States Court of Appeals for the First Circuit.

69. On August 9, 2023, the First Circuit affirmed the District Court's decision, on the basis of Zurich's late-notice defense. *See President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33 (1st Cir. 2023).

G. Marsh's Subsequent Notice Position

70. Since the start of the Zurich coverage litigation, Marsh has taken the position that Marsh was allegedly instructed by Harvard not to notify excess insurers.

71. Harvard expressly denies that it ever instructed Marsh not to notify excess insurers.

72. The absence of any such instruction is corroborated by numerous actions that Marsh did *not* take. Specifically, any such instruction by a policyholder *not* to provide notice would have

triggered a universal standard of care in the insurance industry (including without limitation the standard of care applicable to Marsh in this particular case) requiring the broker (i) to confirm in writing that the client did not want to notify excess insurers; (ii) to advise the client of the risks of not notifying the excess insurers; and (iii) to place a written note in the file that both tasks had been completed. This standard of care is a reflection of the enormous risks inherent in a conscious decision to refrain from providing notice to excess insurers, particularly when such insurance is provided on a claims-made basis.

73. If Marsh genuinely believed that it had been instructed not to provide notice to Harvard's excess E&O insurers, then Marsh breached its contractual obligation and professional standards of care by failing to take those steps.

74. Further, the universal standard of care in the insurance industry (including without limitation the standard of care applicable to Marsh in this case, as well as Marsh's contractual duty in this case) required Marsh, upon an instruction to notify the primary insurer in a claims-made tower, (a) to advise the client in writing also to notify excess claims-made insurers; (b) to advise the client in writing of the risks of not providing immediate notice to excess claims-made insurers; (c) to note in writing in the broker's file that such advice had been given and that the policyholder had nevertheless instructed that such notice to excess claims-made insurers not be given; (d) to revisit the topic of notice to excess claims-made insurers whenever discussing the claim with the policyholder, particularly if new information was communicated to the broker indicating that the claim was more serious than initially believed; and (e) to revisit the topic of notice to the insurer in connection with renewal of (and prior to expiration of) the excess claims-made policies. Marsh breached these contractual duties and standards of care in every respect.

75. The above allegations are not intended to be a complete statement of the contractual duties or professional standards of care applicable to Marsh or breached by Marsh.

H. Tolling of this Action

76. All claims in Massachusetts were tolled 106 days due to the COVID-19 pandemic. *See Shaw's Super-markets, Inc. v. Melendez*, 488 Mass. 338, 342, 345 (2021) (holding that the SJC's COVID-19 Tolling Order applies to all cases, not just those cases where the statutes of limitation would have expired during the tolling period).

77. On May 1, 2023, Marsh and Harvard entered into a Tolling Agreement, effective April 28, 2023, tolling "any and all claims [Harvard] may have against Marsh in connection with the SFFA Litigation" for 180 days. A true and correct copy of the Tolling Agreement is annexed as Exhibit F.

78. The Tolling Agreement lasted until (but not including) October 25, 2023.

79. All claims asserted in this Complaint are timely.

COUNT I
BROKER MALPRACTICE (BREACH OF CONTRACT)

80. Harvard repeats and realleges paragraphs 1 through 80 of the Complaint as if fully set forth herein.

81. Harvard engaged Marsh, pursuant to the 2014–15 Broker Agreement, to act as its insurance broker and to provide professional insurance brokerage services to Harvard, including services relating to the 2014–15 E&O insurance tower.

82. Harvard satisfied all obligations it owed under the Broker Agreement.

83. Pursuant to the Broker Agreement's terms, Marsh was required to assess coverage, to timely and adequately notify all potentially implicated insurance companies of a claim, and to

render such professional advice and services as would be necessary to ensure that Harvard's insurers received timely and adequate notice of claims.

84. Specifically, Marsh was obligated to act as Harvard's "broker and/or risk management consultant" and to "prepare loss notices to insurers and notify insurers of claims; provided that [Harvard's] Marsh claims advocate is informed in writing by [Harvard] of the claim, with details of the claim, and Marsh has placed the applicable policies" Ex. A (Broker Agreement) § 1(p).

85. Marsh was obligated to exercise due care in performing the services required by the Broker Agreement, including in preparing loss notices to insurers and notifying insurers of claims.

86. Zurich has denied coverage to Harvard—and the First Circuit has sanctioned Zurich's denial of coverage (over Harvard's objection)—due solely to late notice of the SFFA Action.

87. The late notice and the resulting lack of coverage under the Zurich excess policy and potentially other excess policies are the direct and proximate result of Marsh's breach of its contractual obligations under the Broker Agreement, as alleged in this Complaint and including without limitation Marsh's failure to timely report the SFFA Action to Zurich or Harvard's other excess E&O insurance companies in the 2014-15 E&O coverage tower.

88. Harvard has incurred and continues to incur defense costs, fees, and expenses in connection with the SFFA Claim, and such amounts will shortly exceed or have already exceeded the policy limits of the underlying AIG Primary Policy.

89. Any defense costs, fees, and expenses in excess of the limits of the AIG Primary Policy would be covered and paid under the Zurich Policy, but for Zurich's successful denial of coverage based on late notice.

90. These insurance benefits were within direct contemplation of the claims-related services that Marsh promised to provide for Harvard under the terms of the Broker Agreement.

91. As a result of Marsh's breach, Harvard also has incurred substantial attorneys' fees in the coverage litigation against Zurich. Those attorneys' fees were within direct contemplation of the claims-related services that Marsh promised to provide for Harvard under the terms of the Broker Agreement. The attorneys' fees and other costs are therefore reasonably foreseeable damages flowing from Marsh's breach of contract.

92. By reason of Marsh's breach of contract, Harvard has suffered damages in an amount to be determined at trial.

COUNT II
DECLARATORY JUDGMENT—
BROKER MALPRACTICE (BREACH OF CONTRACT)
(Coverage and Payment of Defense Costs Under the Zurich Policy)

93. Harvard repeats and realleges paragraphs 1 through 93 of the Complaint as if fully set forth herein.

94. Harvard seeks a declaratory judgment to determine an actual controversy between the parties regarding a breach of Marsh's duties under the Broker Agreement.

95. On information and belief, Marsh denies that it breached the 2014–15 Broker Agreement, denies that it violated applicable standards of care, and denies that it is liable to Harvard for amounts not paid by Zurich or other excess insurers by reason of the untimely notice of the SFFA action.

96. By reason of the foregoing, an actual and justiciable controversy exists between Harvard and Marsh regarding Marsh's breach of its obligations under the Broker Agreement, the damages causally resulting from that breach, and Marsh's liability for those damages.

97. Harvard is entitled to a judicial determination by this Court that Marsh is liable to Harvard for all damages causally resulting from the lack of coverage under the Zurich Policy (and potentially other excess policies) resulting from Marsh's failure to provide timely notice to Zurich (and potentially other excess insurers) and Zurich's resulting successful denial of coverage. Such a judicial determination is necessary and appropriate at this time under the circumstances alleged.

COUNT III
BROKER MALPRACTICE (TORT)

98. Harvard repeats and realleges paragraphs 1 through 98 of the Complaint as if fully set forth herein.

99. As Harvard's insurance broker, Marsh assumed a duty to act in accordance with the standards of care applicable to professionals in the insurance brokerage industry, both nationally and in Massachusetts.

100. As set forth in detail in this Complaint, Marsh violated the applicable standards of care in numerous respects.

101. By violating the applicable standards of care, Marsh committed professional negligence.

102. Marsh's professional negligence was the direct and proximate cause of Zurich's successful denial of coverage for the SFFA claim, the potential denial of coverage by other excess E&O carriers in the same 2014-15 tower, and all resulting damages flowing from Harvard's inability to recover under those excess policies for all past and future defense costs, fees, and expenses incurred in connection with the SFFA claim that are in excess of the limits of liability of the AIG Primary Policy.

103. The insurance benefits available under the excess E&O policies were within direct contemplation of the parties when Marsh assumed the duties of acting as Harvard's professional insurance broker.

104. As a result of Marsh's breach, Harvard incurred substantial attorneys' fees in the coverage litigation against Zurich. Those attorneys' fees were within direct contemplation of the parties when Marsh assumed the duties of acting as Harvard's professional insurance broker. The attorneys' fees are therefore reasonably foreseeable damages flowing from Marsh's breach of the appropriate standard of care.

105. By reason of Marsh's professional negligence, Harvard has suffered damages in an amount to be determined at trial.

COUNT IV
DECLARATORY JUDGMENT—BROKER MALPRACTICE (TORT)
(Coverage and Payment of Defense Costs Under the Zurich Policy)

106. Harvard repeats and realleges paragraphs 1 through 106 of the Complaint as if fully set forth herein.

107. Harvard seeks a declaratory judgment to determine an actual controversy between the parties regarding a breach of Marsh's professional negligence.

108. On information and belief, Marsh has denied that it committed professional negligence, denies that it violated applicable standards of care, and denies that it is liable to Harvard for amounts not paid by Zurich or other excess insurers by reason of the untimely notice of the SFFA Action.

109. By reason of the foregoing, an actual and justiciable controversy exists between Harvard and Marsh regarding Marsh's professional negligence, the damages causally resulting from that professional negligence, and Marsh's liability for those damages.

110. Harvard is entitled to a judicial determination by this Court that Marsh is liable to Harvard for all damages causally resulting from the lack of coverage under the Zurich Policy (and potentially other excess policies) resulting from Marsh's professional negligence in failing to provide timely notice to Zurich (and potentially other excess insurers) and Zurich's resulting successful denial of coverage. Such a judicial determination is necessary and appropriate at this time under the circumstances.

Prayer for Relief

WHEREFORE, Harvard respectfully requests:

- A. Judgment in an amount equivalent to all defense costs, fees, and expenses paid or to be paid by Harvard in connection with the SFFA Claim in excess of \$27.5 million;
- B. A declaration that Marsh breached the Broker Agreement;
- C. A declaration that Marsh committed professional negligence;
- D. A declaration that Marsh is liable to Harvard for all damages incurred by Harvard due to the lack of coverage under the Zurich Policy and possibly other excess E&O policies with respect to the defense costs, fees, and expenses incurred or to be incurred by Harvard in connection with the SFFA Claim and the attorneys' fees incurred in the coverage litigation with Zurich;
- E. Costs, attorneys' fees, and expenses incurred by Harvard for this action;
- F. Pre-judgment and post-judgment interest, as provided by law; and
- G. Such other and further relief as the Court may deem just and proper.

Dated: October 25, 2023

Respectfully submitted,

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE

By its attorneys,

/s/ Robert J. Gilbert

Robert J. Gilbert (BBO# 565466)

Daniel W. Sack (BBO# 699290)

Haley P. Denler (BBO# 710906)

LATHAM & WATKINS LLP

John Hancock Tower, 27th Floor

200 Clarendon Street

Boston, MA 02116

Telephone: (617) 948-6059

Facsimile: (617) 948-6001

robert.gilbert@lw.com

daniel.sack@lw.com

haley.denler@lw.com