IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BLUE HEN MECHANICAL, INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N10C-04-078 MMJ
v.	)	
	)	
ATLANTIC STATES INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

Submitted: March 21, 2011
Decided: April 21, 2011

On Defendant Atlantic States Insurance Company's
Motion for Summary Judgment
GRANTED

OPINION

Jeffrey M. Weiner, Esquire, Wilmington, Delaware, Attorney for Plaintiff

Colin Shalk, Esquire, Joshua H. Meyeroff, Esquire (argued), Casarino, Christman, Shalk, Ransom & Doss, P.A., Wilmington, Delaware, Attorneys for Defendant

JOHNSTON, J.

On August 6, 2009, Christian Brothers Risk Pooling Trust a/s/o Little Sisters of the Poor ("Little Sisters") filed an action in Superior Court against Blue Hen Mechanical, Inc. ("Blue Hen"). The complaint alleged that Little Sisters suffered damage to their HVAC chiller unit following an ambient freeze. When the chiller warmed sufficiently to thaw a frozen tube, the chiller lost refrigerant to the chilled water system, which allowed water to infiltrate a circuit within the chiller.

Little Sisters claimed that the loss was caused solely by the failure of Blue Hen to properly inspect, maintain and repair the HVAC equipment in accordance with Blue Hen's maintenance contract. Further, the complaint enumerated instances of Blue Hen's negligence, including failure to inspect, maintain, and make necessary repairs.

Blue Hen filed this action on April 12, 2010, seeking a declaratory judgment that Atlantic States Insurance Company ("Atlantic") has a duty to defend the Little Sisters action, and to indemnify Blue Hen. Additionally, Blue Hen requests costs, and punitive damages for Atlantic's purported bad faith failure to investigate and advise Blue Hen about defense and indemnification.

Atlantic filed a Motion for Summary Judgment. Atlantic claims that it is entitled to judgment as a matter of law that it has no duty to defend or indemnify Blue Hen.

Parties' Contentions

Atlantic argues that the breach of contract claim in the underlying complaint is not covered. The insurance policy at issue covers "property damage" caused by an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Thus, Atlantic urges that there is no coverage for breach of contract, because property damage resulting from a breach of contract cannot be caused by an accident.[1]

Atlantic also contends that the underlying negligence claim cannot be the basis for a duty to defend. The policy excludes property damage to "your product" and damage to "your work." As defined in the policy:

> 19. "Your work" means:
>
> a. Work or operations performed by you or on your behalf, and
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> b. Materials, parts or equipment furnished in connection with such work or operations.

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[1] *See Mandarano v. Harleysville Mut. Ins. Co.,* C.A. No. 06C-03-047 (Del. Super. May 29, 2009), *aff'd,* 985 A.2d 390 (Del. 2009)(finding no duty to defend breach of contract claim for damage resulting from accidental fire, when statute of limitations for tort claim had passed).

"Your work" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

b. The providing of or failure to provide warnings or instructions.

Atlantic claims that all allegations in the underlying complaint are for property damage to work performed by or on behalf of Blue Hen. Therefore, Atlantic is not liable for damage to the Chiller arising from Blue Hen's work.

Blue Hen counters that the complaint, read as a whole, sets forth other possible causes of damage, which would be covered by the Atlantic policy. Paragraphs 4, 6 and 7 of the underlying complaint set forth facts that could reasonably be construed as forming the basis for risks not caused by the negligence or breach of contract by Blue Hen. For example, the damage could have been caused by an unavoidable accident or natural cause such as freezing weather.

The contract between Little Sisters and Blue Hen was effective January 25, 2008. The damage occurred on March 3, 2008. Blue Hen proffers that the complaint can be read as indicating that the damage resulted from an inadequate and faulty winterization process for the chiller. Winterization necessarily must have occurred prior to the effective date of the contract; and the work must have

been performed by a prior HVAC contractor. Further, Blue Hen argues that the complaint can be fairly read as pointing to a possible mechanical design defect in the chiller as the cause of the damage.

ANALYSIS

Summary Judgment Standard

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party. Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances[3]. When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4]

Duty to Defend

The Delaware Supreme Court established the test to determine whether an insurer has a duty to provide a legal defense in an action against its insured.

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[2]Super. Ct. Civ. R. 56(c).

[3]*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[4]*Wootten v. Kiger,* 226 A.2d 238, 239 (Del. 1967).

> "In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend." The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy. Determining whether an insurer is bound to defend an action against its insured requires adherence to the following principles: (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[5]

The Court generally will review only two documents in its determination of the insurer's duty to defend: the insurance policy and complaint. The duty to defend arises where the insured can show that the underlying complaint, read as a whole, alleges a risk potentially within the coverage of the policy.[6] An insurer has a duty to defend where the factual allegations in the underlying complaint potentially support a covered claim.[7]

The complaint must allege some grounds for liability on the part of the insured, based upon a risk covered by the policy, for the duty to defend to arise.

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[5] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.,* 956 A.2d 1246, 1254-55 (Del. 2008)(quoting *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.,* 761 A.2d 826, 829 (Del.2000)).

[6] *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.,* 317 A.2d 101, 103 (Del. 1974).

[7] *Virtual Business Enterprises, LLC v. Maryland Cas. Co.,* 2010 WL 1427409, at *4 (Del. Super.); *DynCorp v. Certain Underwriters at Lloyd's, London,* 2009 WL 3764971, at *3 (Del. Super.).

The Court is not bound by the narrow language in a complaint filed against an insured. The Court may review the complaint as a whole, considering all reasonable inferences that may be drawn from the alleged facts. An examination of the complaint is not limited to the plaintiff's unilateral characterization of the nature of the claims.

One purpose of the duty to defend is to provide the insured with a defense, even if the insured is found not to be liable at the conclusion of the action. The duty to defend is not affected by the validity of the underlying claims. Even if the complaint at issue sets forth frivolous allegations, or obviously meritless assertions, the insurer still must provide a defense if the insured has purchased a policy including a duty to defend; and the complaint against the insured alleges at least one count or theory involving an insured risk. Doubt must be resolved in favor of the insured. Any ambiguity in the pleadings should be resolved against the carrier.

The insured bears the burden of proving that a claim is covered by an insurance policy.[8] Where the insured has shown that a claim is covered by an

[8] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.,* 693 A.2d 1059, 1061 (Del. 1997).

insurance policy, the burden shifts to the insurer to demonstrate that a policy exclusion prevents coverage.[9]

The determination of whether a party has a duty to defend should be made at the outset of the case. An early decision provides the insured with a defense at the beginning of the litigation and permits the insurer to control the defense strategy.[10] When determining an insurer's duty to indemnify and/or defend a claim asserted against a policy holder, the Court will look to the allegations in the underlying complaint to decide whether the action against the policy holder states a claim covered by the policy. Usually, an insurer's duty to defend is broader than its duty to indemnify an insured.[11] The insurer will have a duty to indemnify only when the facts in that claim are actually established. [12]

Underlying Claims and Covered Risk

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[9]*Deakyne v. Selective Ins. Co. of America,* 728 A.2d 569, 571 (Del. Super. 1997); *State Farm Fire & Cas. Co. v. Hackendorn,* 605 A.2d 3, 7 (Del. Super. 1991).

[10]*Am. Ins. Group v. Risk Enter. Mgmt., Ltd.,* 761 A.2d 826, 829 (Del. 2000).

[11]*Liggett Group, Inc. v. Ace Property and Cas. Ins. Co.,* 798 A.2d 1024, 1030 (Del. 2002).

[12]*LaPoint v. AmerisourceBergen Corp.,* 970 A.2d 185, 197 (Del. 2009) (As a general rule, "decisions about indemnity should be postponed until the underlying liability has been established" because a declaration as to the duty to indemnify "may have no real-world impact if no liability arises in the underlying litigation.") (quoting *Molex Inc. v. Wyler,* 334 F.Supp.2d 1083, 1086 (N.D.Ill. 2004)).

For purposes of Atlantic's summary judgment motion, the question is whether the policy and the complaint give rise to Atlantic's duty to provide a defense.

The breach of contract claim - as specifically alleged in the complaint - clearly is excluded by the policy. Thus, that claim cannot trigger a duty to defend.

Should Little Sisters ultimately be successful in proving that the damage to the chiller was caused by Blue Hen's negligence - as explicitly asserted in the complaint - the policy also excludes coverage under the definition of "your work." As a result, the negligence claims do not give rise to a duty to defend.[13]

Having reviewed the Little Sisters' complaint, and considering all reasonable inferences, the Court finds that the complaint can be read fairly as setting forth grounds for liability of parties other than Blue Hen. The alleged facts could demonstrate that the damage was caused by: an unavoidable accident; the negligence or breach of contract of a previous HVAC contractor; or a design defect in the chiller. If any of these other possible causes of damage are found, any fault would lie with a prior HVAC contractor or with the chiller manufacturer. In these circumstances, Blue Hen would not be liable. If there is no possible

[13]During oral argument, Blue Hen asserted that it theoretically could incur joint an several liability. Under the unique facts and circumstances in this action and the underlying complaint, the Court finds this possibility too attenuated to trigger a duty to defend.

manner in which Blue Hen could be liable under theories not specifically enumerated in the complaint, *a fortoriari*, there can be no risk covered by the Atlantic policy. If there is no covered risk, there can be no duty to defend.

CONCLUSION

The Court finds that the underlying complaint fails to set forth any basis by which Blue Hen could be liable for a covered risk. Considering the Atlantic policy and the complaint, as well as all reasonable inferences that can be drawn from the facts and allegations set forth in the complaint, the Court finds that there is no duty on the part of Atlantic to provide a defense to Blue Hen in the underlying action.

THEREFORE, Defendant's Motion for Summary Judgment is hereby **GRANTED.** Blue Hen's request for summary judgment is hereby **DENIED.**

IT IS SO ORDERED.

/s/ Mary M Johnston
The Honorable Mary M. Johnston