IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

UNITED WESTLABS, INC., a Delaware corporation, HARRY KANTER, a California resident, and ROBERT NEGOSIAN, a California resident,	)	
Plaintiffs,	)	C.A. No. 09C-12-048 MMJ
v.	)	
GREENWICH INSURANCE COMPANY, a Delaware corporation, and AXIS SURPLUS INSURANCE COMPANY, an Illinois corporation,	)	
Defendants.	)	

Submitted: May 5, 2011
Decided: June 13, 2011
Corrected: July 1, 2011

United Westlabs, Inc.'s Motion for Summary Judgment
Greenwich Insurance Company's Motion for Summary Judgment
Axis Surplus Insurance Company's Motion for Summary Judgment

CORRECTED OPINION

Mark M. Billion, Esquire, The Law Office of Mark Billion, Wilmington, Delaware, Of Counsel: Jerold Oshinsky, Esquire (Argued), Kenneth Lee, Esquire, Jenner & Block LLP, Los Angles, California; Matthew L. Jacobs, Esquire, J.H. Jennifer Lee, Esquire, Jenner & Block LLP, Washington, DC, Attorneys for Plaintiffs

Carmella P. Keener, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware; Of Counsel: Jennifer Mathis, Esquire (Argued), Peter R. Lucier, Esquire, Troutman Sanders LLP, Irvine, California, Attorneys for Defendant, Greenwich Insurance Company

James W. Semple, Esquire (Argued), Brett M. McCartney, Esquire, Morris James LLP, Wilmington, Delaware, Attorneys for Defendant Axis Surplus Insurance Company

JOHNSTON, J.

Plaintiffs United Westlabs, Inc., Harry Kanter, and Robert Negosian's (collectively "UWL") seek insurance coverage for the liability and expenses stemming from their dispute with Seacoast Laboratory Data Systems. Kanter and Negosian are UWL officers. Seacoast installed, licensed, and maintained UWL's billing and financial forecasting system. UWL secured liability coverage with Axis Insurance Company and Greenwich Insurance Company while its dispute with Seacoast was ongoing. Subsequently, UWL tendered insurance claims to Axis and Greenwich. Axis and Greenwich denied coverage.

UWL brought suit against Axis and Greenwich, claiming that, pursuant to the insurance policies, defendants breached their duty to defend and pay defense expenses. Greenwich counterclaimed, seeking declaratory judgment that it does not have a duty to defend.

UWL has moved for partial summary judgment against Axis and Greenwich, claiming that they are obligated to defend UWL against Seacoast's claims. Axis filed a cross-motion for summary judgment against UWL, asserting that UWL's insurance claim falls outside of the coverage it provided. Greenwich also filed a cross-motion for summary judgment, arguing that UWL's insurance claim falls outside of the coverage it provided.

For the following reasons, UWL's motions for summary judgment are denied, Axis's motion for summary judgment is granted, and Greenwich's motion for summary judgment is granted.

FACTUAL AND PROCEDURAL CONTEXT

UWL is a Delaware corporation with its principle place of business in Santa Ana, California. UWL is in the business of providing laboratory services to hospitals in the United States. In October 2005, UWL contracted with Seacoast for the SurroundLab AR billing system ("SLAR"), which is designed to manage UWL's receivables and gauge financial performance. Seacoast regards SLAR to be a trade secret, and therefore, only Seacoast programmers are given access to SLAR's file and data structures through a remote virtual private network ("VPN"). Among other provisions, the contract ("SLAR Agreement") provided that UWL enroll qualified personnel for SLAR training and pay Seacoast maintenance and service fees.

UWL's relationship with Seacoast deteriorated. On August 22, 2006, UWL notified Seacoast that it was experiencing difficulties with SLAR and was suspending payments until the problems are resolved. On November 2, 2006, UWL informed Seacoast that, because the SLAR issues had not been resolved, UWL was entitled to a full refund of the payments it had made.

On November 27, 2006, Seacoast responded that UWL was in breach of the SLAR agreement for failing to provide a sufficient number of qualified personnel for training, and for failing to pay the fees required by the SLAR Agreement. On January 2, 2007, Seacoast informed UWL that if it did not pay the outstanding fees, Seacoast would rescind the SLAR Agreement.

On January 5, 2007, UWL deactivated Seacoast's VPN access to SLAR. This rendered Seacoast incapable of terminating UWL's access to SLAR.

On January 10, 2007, Seacoast notified UWL that it was rescinding the SLAR agreement. Seacoast also stated that it considered UWL's continued use of SLAR to be copyright infringement.

The January 2007 Arbitration and February 2007 Action

On January 12, 2007, UWL commenced arbitration with Seacoast, asserting that Seacoast breached the SLAR agreement ("January 2007 Arbitration"). Seacoast counterclaimed, alleging that UWL breached the SLAR agreement and committed copyright infringement ("Seacoast's 2007 Counterclaims").

On February 5, 2007, UWL brought a claim against Seacoast in the United States Federal District Court for the Central District of California,

seeking declaratory judgment that it had not committed copyright infringement and seeking to enjoin Seacoast from filing civil claims until the January 2007 Arbitration concluded ("February 2007 Action").

On March 27, 2007, the January 2007 Arbitration and February 2007 Action were dismissed without prejudice. UWL and Seacoast agreed to revise the SLAR Agreement to clarify their duties and obligations ("March 2007 Settlement Agreement"). Nonetheless, their relationship continued to deteriorate.

The Axis Policy

On May 4, 2007, UWL submitted an insurance policy application to Axis. The application sought disclosure of "claims, suits or proceedings . . . made during the past five years against [UWL] . . .." UWL did not divulge any part of its ongoing dispute with Seacoast. Axis issued the Pro TechNet Solutions Insurance Policy ("Axis Policy").

The application explained:

- The policy for which you are applying, if issued, will not insure any claims, suits or proceedings made against you before the inception date . . . [of the policy] or any subsequent claims, suits or proceedings (emphasis omitted).

- The policy for which you are applying, if issued, will not insure any claims that can be reasonably expected to arise from any actual or alleged fact, circumstance, situation, error or omission known to any of you before the inception date of the policy (emphasis omitted).

The Axis Policy covers claims made against UWL for "Wrongful Acts in performing Cyber and Technology Activities," including "unauthorized access to, unauthorized use of, tampering with or introduction of malicious code into data or systems" and "repetitively accessing a website, under the control of an insured, with the intent to deny others access to such website or with the intent to cause such website's functionality to fail, including what is commonly referred to as denial of service attacks . . .." "Cyber and Technology Activities" include "analysis, design, programming or integration of information systems" and "marketing, selling, distributing, installing, maintaining and training in the use of electronic or computer related hardware and software." The policy covers UWL for up to $10 million for each "wrongful act" and includes a duty to defend and pay defense expenses.

The Axis Policy includes the following relevant definitions:

- "Claim" is defined as "a demand or assertion of a legal right made against any Insured, even if any of the allegations of the Claim are groundless, false or fraudulent. Claim also means Regulatory Action or a suit seeking injunction relief relating to the Wrongful Acts. . .."

- "Wrongful Act" is defined as "conduct or alleged conduct . . . by the Insured or any person or organization for whom the Insured is legally liable."

- "All Wrongful Acts that: (1) take place between the Retroactive Date and the end of the Policy Period of the last

The Axis Policy is a "Claims Made Policy," providing:

> This insurance coverage is on a claims made basis. Coverage applies only to those claims that are first made during the policy period and any extended reporting period, if applicable, as those terms are described in this policy. Coverage does not apply to any wrongful acts committed before the retroactive date stated on the declarations page.

The retroactive date stated on the declarations page is May 2, 2004.

The Axis Policy contains the following relevant conditions:

- [The] insurance applies when a written Claim is first made against an Insured during the Policy Period. To be covered, the Claim must also arise from a Wrongful Act committed during the Policy Period. The [Insurer] will consider a Claim to be first made against an Insured when a written Claim is first received by any Insured ("Condition B.1").

- All Claims arising from the same Wrongful Act will be deemed to have been made on the earlier of the following dates: (a) the date the first of those Claims is made against any Insured; or (b) the first date the [Insurer] receives the Insured's written notice of the Wrongful Act. The provisions of this Policy in effect on that date will apply ("Condition B.5").

The preamble to Condition B.5 explains that it is "intended to set forth one of the many scenarios under which the Policy affords coverage, and it does not operate to exclude coverage."

The Axis Policy contains the following relevant exclusions:

- The Company will not be obligated to pay Damages or Claim Expenses or defend Claims for or arising out of actual or alleged . . . breach of contract, warranty or guarantee; however, with respect to allegations of breach of contract this Exclusion shall not apply to any liability that would have attached in the absence of such contract or liability Assumed Under Contract ("Exclusion V.A.6").

- [Coverage for] intentional unauthorized access to, unauthorized use of, tampering with or introduction of malicious code into data or systems by any insured or person who would qualify as an insured but for their acts being outside the scope of their duties as a partner, officer, director or employee of the insured ("Exclusion B.2").

In 2008, UWL renewed the Axis Policy. The renewal application warned:

> Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime and may be punishable by fines and confinement in prison (emphasis omitted).

UWL did not divulge any details regarding its dispute with Seacoast.

The Greenwich Policy

On August 24, 2008, UWL submitted an application to Greenwich for insurance coverage. The application questioned:

> During the last 5 years, has any Insured known of, or been involved in any lawsuit, charges, inquiries, investigations,

> grievances or other administrative hearings or proceedings before any of the following agencies and/or in any of the following forums, including domestic or foreign equivalents . . . [notably a] U.S. District or state court?

UWL did not disclose its involvement in the January 2007 Arbitration or February 2007 Action. Greenwich issued a Private Company Reimbursement Insurance Policy, covering UWL from September 9, 2008 to September 9, 2009 ("Greenwich Policy").

The Greenwich Policy includes the following relevant definitions:

- "Claim" means "(1) any written notice received by an Insured that any person or entity intends to hold any Insured responsible for a Wrongful Act, including any such notice seeking monetary or non-monetary relief; [or] (2) any civil proceeding in a court of law or equity, or arbitration."

- "Wrongful Act" means "(1) with respect to any Insured Person of the Company, any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty solely by reason of his or her status as such; and (2) with respect to the Company, any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by the Company."

- "Interrelated Wrongful Acts" are defined as "Wrongful Acts which are based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related or series of related facts, circumstances, situations, transactions or events.

The Greenwich Policy is a "Claims Made Policy," providing: "except as otherwise provided herein, this policy only applies to claims first made

during the policy period, or, if applicable, the optional extension period." The policy details the circumstances under which coverage is triggered:

> (A) The Insurer shall pay on behalf of the Insured Persons' Loss resulting from a Claim first made against the Insured Persons during the Policy Period or, if applicable, the Optional Extension Period, for a Wrongful Act, except for Loss which the Company is permitted or required to pay on behalf of the Insured Persons as indemnification. (B) The Insurer shall pay on behalf of the Company Loss: (1) which the Company is required or is permitted to pay as indemnification to the Insured Persons resulting from a Claim first made against the Insured Persons; or (2) resulting from a Claim first made against the Company; during the Policy Period, or, if applicable, the Optional Extension Period, for a Wrongful Act.

The Greenwich Policy contains an "Interrelated Claims" provision: "All Claims arising from Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest time at which the earliest Claim is made or deemed to have been made . . .."

Finally, the Greenwich Policy contains the following relevant exclusions:

- The Insured shall not recover for "any actual or alleged liability of the company under any express contract or agreement . . . an actual agreement of the parties, the terms of which are openly set forth or declared at the time of making in clear or distinct language" ("Contract Exclusion").

- The Insured shall not recover for any claim "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged:

The December 2008 Action

In the fall of 2008, UWL and Seacoast attempted to salvage their business relationship. Seacoast considered granting UWL a perpetual license for SLAR. Ultimately, Seacoast did not agree to release its proprietary software because that would allow UWL to reproduce and sublicense SLAR. Negotiations were at an impasse.

On December 15, 2008, Seacoast demanded $354,681.25 in service and maintenance fees. Seacoast warned UWL that if it did not receive payment within 30 days, it would terminate UWL's access to SLAR. In response, UWL again terminated Seacoast's VPN access.

On December 31, 2008, UWL brought a claim in the United States Federal District Court for the Central District of California: asserting that Seacoast breached the March 2007 Settlement Agreement; seeking declaratory judgment that UWL's use of SLAR did not constitute copyright infringement; and seeking a temporary restraining order to preclude Seacoast

from accessing SLAR ("December 2008 Action"). The District Court granted UWL's application for a temporary restraining order.

On January 14, 2009, UWL informed Axis of Seacoast's "potential cyber extortion threat." Axis requested documents relevant to the dispute. UWL did not comply at that time.

On March 18, 2009, Seacoast counterclaimed in the December 2008 Action, asserting that UWL breached the SLAR agreement and violated California's unfair competition law ("Seacoast's 2009 Counterclaims"). Additionally, Seacoast requested a temporary restraining order to enjoin UWL from allegedly "hacking" into SLAR and committing copyright infringement. Seacoast claimed that UWL commissioned a "MUMPS programmer" to hack into SLAR. Seacoast subsequently amended its counterclaim, adding Kanter and Negosian and asserting additional causes of action.

In April 2010, UWL and Seacoast agreed to mediate the December 2008 Action, which resulted in an April 30, 2010 stipulation that dismissed the December 2008 Action with prejudice.

Axis and Greenwich Deny Coverage

On March 16, 2009, UWL tendered Seacoast's 2009 Counterclaims to Axis, seeking coverage under the Axis Policy. Around this time, UWL

furnished Axis documents relevant to the ongoing dispute. On March 27, 2009, Axis denied UWL coverage, explaining that these claims were "first made" before the Axis Policy period.

On June 11, 2009, UWL informed Greenwich of its dispute with Seacoast and tendered Seacoast's 2009 Counterclaims, seeking defense costs. Greenwich responded on September 1, 2009, denying coverage. Greenwich explained that Seacoast's 2009 Counterclaims were "first made" before the Greenwich Policy period.

This Action

As a result of Axis and Greenwich's refusal to cover Seacoast's 2009 Counterclaims, UWL filed this lawsuit on December 2, 2009, alleging six causes of actions. On October 13, 2010, UWL dismissed four of its causes of action, maintaining its claim for breach of duty to pay defense fees and costs against Axis and its claim for breach of duty to pay defense fees and costs against Greenwich.

On May 24, 2010, UWL moved for partial summary judgment against Greenwich. UWL asserts that Seacoast's 2009 Counterclaims fall under the "wrongful acts" that the Greenwich Policy covers.

On July 15, 2010, UWL moved for partial summary judgment against Axis. UWL argues that Seacoast's 2009 Counterclaims fall under the "wrongful acts" that the Axis Policy covers.

On October 20, 2010, Axis moved for summary judgment against UWL. Axis contends that several provisions of the Axis Policy bar UWL from recovering.

Also on October 20, 2010, Greenwich moved for summary judgment against UWL. Greenwich asserts that several provisions of the Greenwich Policy bar UWL from recovering.

Timeline Summary

The following outlines the sequence of events significant to this case:

- October 10, 2005: UWL contracted with Seacoast for SLAR.
- August 22, 2006: UWL notified Seacoast about the problems with SLAR, and suspended payments.
- November 2, 2006: UWL informed Seacoast that UWL was entitled to a full refund because the SLAR issues were not resolved.
- November 27, 2006: Seacoast informed UWL that UWL was in breach of the SLAR Agreement because it failed to provide a sufficient number of qualified personnel for training and did not pay the agreed fees.
- January 2, 2007: Seacoast informed UWL that if Seacoast did not receive the outstanding payments, it would rescind the SLAR Agreement.

- January 5, 2007: UWL informed Seacoast that it had terminated Seacoast's VPN access.

- January 10, 2007: Seacoast informed UWL that it had terminated the SLAR Agreement.

- January 12, 2007: UWL commenced arbitration with Seacoast, alleging that UWL breached the SLAR Agreement.

- January 24, 2007: Seacoast counterclaimed in the January 2007 Arbitration, alleging that UWL breached the SLAR Agreement and committed copyright infringement.

- February 5, 2007: UWL brought a claim against Seacoast in the United States District Court for the Central District of California, seeking declaratory judgment that it had not committed copyright infringement and seeking to enjoin Seacoast from filing civil claims until the January 2007 Arbitration was completed.

- March 27, 2007: UWL and Seacoast agreed to dismiss the January 2007 Arbitration and the February 2007 Action without prejudice.

- May 4, 2007: UWL applied for insurance with Axis.

- May 2, 2007: The Axis Policy commenced pursuant to its Inception Date.

- May 2, 2008: UWL renewed the Axis Policy.

- August 24, 2008: UWL applied for insurance with Greenwich.

- September 9, 2008: The Greenwich Policy commenced.

- October 6, 2008: UWL sought the right to reproduce and sublicense SLAR. Seacoast refused.

- December 15, 2008: After further failed negotiations, Seacoast demanded $354,681.25 in fees and threatened to terminate UWL's

- December 19, 2008: Seacoast informed UWL that terminating its VPN access violated the SLAR Agreement.

- December 26, 2008: UWL responded that it did not owe Seacoast any fees pursuant to the March 27, 2007 Settlement Agreement.

- December 31, 2008: UWL brought claims against Seacoast in the United States District Court for the Central District of California: asserting that Seacoast breached the March 2007 Settlement Agreement; seeking declaratory judgment that its use of SLAR did not constitute copyright infringement; and seeking a temporary restraining order to preclude Seacoast from accessing SLAR.

- January 14, 2009: UWL first informed Axis of its dispute with Seacoast.

- January 14, 2009: Seacoast counterclaimed in the December 2008 Action, alleging that UWL breached the SLAR Agreement and violated California's unfair competition law.

- March 13, 2009: Seacoast accused UWL of hacking into SLAR.

- March 16, 2009: UWL tendered Seacoast's 2009 Counterclaims to Axis.

- March 18, 2009: Seacoast supplemented its 2009 Counterclaims by filing an application for a temporary restraining order to enjoin UWL from hacking and committing copyright infringement.

- March 20, 2009: UWL provided Axis with additional documents related to Seacoast's March 18, 2009 application for a temporary restraining order.

- March 27, 2009: Axis denied coverage.

- June 11, 2009: UWL tendered Seacoast's 2009 Counterclaims to Greenwich.

- September 1, 2009: Greenwich denied coverage.

- December 2, 2009: UWL filed this action against Axis and Greenwich.

- April 30, 2010: UWL and Seacoast settled their claims, dismissing the December 2008 Action with prejudice.

- May 24, 2010: UWL moved for partial summary judgment against Greenwich.

- July 15, 2010: UWL moved for partial summary judgment against Axis.

- August 31, 2010: Axis moved for summary judgment against UWL.

- August 31, 2010: Greenwich moved for summary judgment against UWL.

- October 13, 2010: UWL voluntarily dismissed four of its causes of action, maintaining its claim for breach of duty to pay defense fees and costs against Greenwich and its claim for breach of duty to pay defense fees and costs against Axis.

ANALYSIS

Choice of Law

Greenwich asserts that Delaware law and California law "materially differ with respect to some issues of insurance contract interpretation." However, Greenwich does not support its assertion with case law or otherwise explain how Delaware Law and California law differ. Axis and

UWL do not contend that Delaware law and California law differ as to any issue. Because Greenwich has failed to identify how applicable Delaware and California law differ, and Axis and UWL agree that the laws do not differ, the Court need not resolve the issue and will apply Delaware law.

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.[1] All facts are viewed in a light most favorable to the non-moving party.[2] 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] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

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[1] Super. Ct. Civ. R. 56(c).
[2] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).
[3] Super. Ct. Civ. R. 56(c).
[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Because no party asserts that genuine issues of material fact exist, all motions for summary judgment are considered together as a stipulation for decision on the merits pursuant to Superior Court Civil Rule 56(h).[6]

Duty to Defend

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.[7] Generally, an insurer's duty to defend is broader than its duty to indemnify.[8] An insurer has a duty to defend where the factual allegations in the underlying complaint potentially support a covered claim.[9] The insurer will have a duty to indemnify only when the facts in that claim are actually established.[10]

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[6] Super. Ct. Civ. R. 56(h) provides: "Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."

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

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

[9] *DynCorp v. Certain Underwriters at Lloyd's, London*, 2009 WL 3764971, at *3 (Del. Super.).

[10] *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, 1087 (N.D. Ill. 2004)).

The insured bears the burden of proving that a claim is covered by an insurance policy.[11] Where the insured has shown that a claim is covered by an insurance policy, the burden shifts to the insurer to prove that the event is excluded under the policy.[12]

The Delaware Supreme Court has outlined three principles to determine whether an insurer has a duty to defend an insured:

> (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.[13]

The Court generally will look at two documents in its determination of the insurer's duty to defend: the insurance policy and the pleadings of the underlying lawsuit.[14] 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.[15]

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[11] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).
[12] *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 7 (Del. Super. 1991).
[13] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254-55 (Del. 2008) (internal citations omitted).
[14] See *KLN Steel Products Co., Ltd. v. CAN Ins. Co.*, 278 S.W.3d 429, 434 (Tex. App. 2008).
[15] *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974); *Virtual Business Enterprises, LLC v. Maryland Cas. Co.*, 2010 WL 1427409, at *4 (Del. Super.).

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. 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.[16]

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 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

[16] *Blue Hen Mech., Inc. v. Atl. States Ins. Co.*, 2011 WL 1598575, at *3 (Del. Super.).

defense at the beginning of the litigation and permits the insurer to control the defense strategy.[17]

In this case, if the undisputed facts, considered together with legal interpretation of all relevant policy language, demonstrate that there is or is not coverage, the prevailing party is entitled to summary judgment on the coverage issue. The standard is not whether there is potential for coverage under the policy, but whether the claims asserted against the insured allege risks potentially within the coverage of the policy.

Where a claim is properly "first made," within the time parameters of the policy, but at the time the claim is made, it cannot be definitively determined from the substantive pleadings of the underlying lawsuit whether the claim is covered, the lawsuit must proceed in order to be certain whether the claim is a covered claim. In that circumstance, a duty to defend arises.

Contract Interpretation

"The proper construction of any contract ... is purely a question of law."[18] The Court's goal is to ascertain the parties' intent. If the disputed contract terms are unambiguous, it is unnecessary for the Court to look

[17] *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000).
[18] *Rhone-Poulenc Basic Chem. Co. v. Am. Mot. Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

beyond the plain meaning of the language.[19] "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different reasonable interpretations."[20] If a contract is ambiguous, the Court applies "the well-accepted *contra preferentem* principle of construction which is that ambiguities in a contract should be construed against the drafter."[21]

UWL and AXIS's Cross-Motions for Summary Judgment

Parties' Contentions

UWL argues that if there are factual allegations against an insured that *potentially* support a covered claim, the insurer has a duty to defend. UWL contends that a reasonable interpretation of Condition B.1 and Condition B.5 does not bar Axis's obligation to defend and pay related costs and expenses. UWL claims that Condition B.1 "prescribes coverage when a Wrongful Act occurs, *and* when the Claim arising from that Wrongful Act is first made, within the Policy Period" (emphasis in original). Therefore, the relevant inquiry is when the claim is made—not when the wrongful act occurred. UWL argues that Condition B.5 does not preclude coverage because Condition B.1 triggers coverage, and Condition B.5 simply serves to

[19] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992).
[20] *Axis Reinsurance Co. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010) (citing *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001)).
[21] *Nelson v. Kamara*, 2009 WL 1964788, at *1 (Del. Super.) (quoting *Twin City Fire Ins. Co. v. Del. Racing Ass'n.*, 840 A.2d 624, 630 (Del. 2003)).

aggregate multiple claims made during the policy period. UWL cites the preamble to Condition B.5, which explains that it does not operate to exclude coverage.

Axis responds that, because the Axis Policy is a "claims first made" policy, it does not cover claims made prior to its inception. Axis contends that the plain meaning of the Axis Policy language excludes coverage for Seacoast's 2009 Counterclaims because they relate to wrongful acts that took place prior to the Axis Policy's inception. Further, Axis argues that coverage for the Seacoast Counterclaims is barred because UWL did not disclose its involvement with the January 2007 Arbitration and February 2007 Action when it applied for the Axis Policy. Finally, Axis asserts that Exclusion V.A.6 and Exclusion B.2 bar coverage.

The Terms of the Axis Policy Bar Coverage

Seacoast's 2007 Counterclaims and Seacoast's 2009 Counterclaims fall under the Axis Policy's definition of a "Claim." They were "demand[s] or assertion[s] of a legal right made against [UWL]." Seacoast's 2007 Counterclaims and Seacoast's 2009 Counterclaims are still considered "Claims" even if they were "groundless, false or fraudulent."

UWL's conduct before it secured the Axis Policy—refusing to pay Seacoast fees, failing to provide a sufficient number of qualified personnel

to be trained by Seacoast, and deactivating Seacoast's VPN access—fall under the Axis Policy's definition of "Wrongful Acts" (this conduct is referred to as "UWL's 2006-07 Wrongful Acts"). Because UWL's 2006-07 Wrongful Acts brought about Seacoast's 2007 Counterclaims, UWL's 2006-07 Wrongful Acts amount to "alleged conduct . . . for whom [UWL] is legally liable."

Additionally, UWL's conduct in December 2008 falls under the Axis Policy's definition of "Wrongful Acts." UWL refused to pay Seacoast the service and maintenance fees that Seacoast demanded, and again deactivated Seacoast's VPN access (this conduct is referred to as "UWL's 2008 Wrongful Acts"). Because UWL's 2008 Wrongful Acts precipitated Seacoast's 2009 Counterclaims, UWL's 2008 Wrongful Acts amount to "alleged conduct . . . for whom [UWL] is legally liable."

Having concluded that UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts constitute "Wrongful Acts," the Court must determine whether UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts should be treated as a single "Wrongful Act."

The Axis Policy provides:

> All Wrongful Acts that: (1) take place between the Retroactive Date and the end of the Policy Period of the last Insurance Policy issued by the Company to the Insured; and (2) involve the same or related subject, person, class of person or have

> common facts or circumstances or involve common transactions, events or decisions, regardless of the number of repetitions, alterations, actions or forms of communication; will be treated under this Policy as one Wrongful Act.

UWL asserts that UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts are "based on separate injuries and events, the [2008 Wrongful Acts] being predicated on discrete instances of unprecedented conduct following a span of two years after the [2006-07 Wrongful Acts]." This contention lacks merit.

UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts are fundamentally identical. In both instances UWL allegedly breached the SLAR Agreement by refusing to pay various fees and allegedly committed copyright infringement or a "hacking" violation by deactivating Seacoast's access to the VPN. UWL's decision to commission a third-party MUMPS programmer to deactivate Seacoast's VPN access does not distinguish UWL's 2008 Wrongful Acts from UWL's 2006-07 Wrongful Acts. Similarly, UWL's 2008 Wrongful Acts cannot be separated because Seacoast added Kanter and Negosian as defendants for its 2009 Counterclaims. UWL's 2008 Wrongful Acts involve the same subject, as well as common facts, circumstances, transactions, events, and decisions as UWL's 2006-07 Wrongful Acts. UWL engaged in a continuous series of related acts, constituting a single wrongful act as defined by the Axis Policy.

Additionally, the language in Seacoast's 2007 and 2009 Counterclaims is virtually identical.

Because UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts took place after the retroactive date (May 2, 2004), occurred during the Axis Policy period, and involve the same subject and common facts, circumstances, transactions, events, and decisions, the Court finds that UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts constitute a single Wrongful Act, as defined by the Axis Policy.

Next, the Court must determine when the claims arising from that Wrongful Act—Seacoast's 2007 and 2009 Counterclaims—were first made. Condition B.5 provides, in pertinent part:

> All Claims arising from the same Wrongful Act will be deemed to have been made on the earlier of the following dates: (a) the date the first of those Claims is made against any Insured; or (b) the first date the [Insurer] receives the Insured's written notice of the Wrongful Act.

Seacoast's 2007 Counterclaims were made in January 2007. Seacoast's 2009 Counterclaims were made March 2009. Therefore, the Claims arising from the single Wrongful Act were first made in January 2007.

As a result, Condition B.1 excludes coverage for Seacoast's 2007 and 2009 Counterclaims. Condition B.1 provides, in pertinent part: "insurance applies when a written Claim is first made against an Insured

during the Policy Period." Pursuant to the terms of the Axis Policy, Seacoast's 2009 Counterclaims (considered along with Seacoast's 2007 Counterclaims as one Wrongful Act) are deemed to have been made in January 2007. Therefore, Seacoast's 2009 Counterclaims were "first made" before May 2, 2007, the Axis Policy's inception date.

UWL's argument—that the preamble to Condition B.5 precludes it from operating to bar coverage—is unpersuasive. Condition B.5 (Multiple Claims) simply controls the date on which a Wrongful Act is deemed to have been made for the purposes of the Axis Policy.

The Court's conclusion is not affected by the parties' disagreement about whether the first arbitration and lawsuit were "settled." The undisputed facts demonstrate a continuum of common facts, related events, and alleged wrongful acts. The Court finds no substantive distinction between threats to cut off service for failure to pay fees, and "cyber extortion." For the purposes of these motions, "hacking" is the equivalent of copyright infringement. The acts are the same, whether performed by UWL employees or by an outside party on UWL's behalf. Adding additional defendants does not create new claims, so long as the wrongful acts are interrelated.

UWL's Omission Prevents Recovery

Section 2711 of Title 18 of the Delaware Code prevents recovery under an insurance contract where the insured makes misrepresentations, omissions, or conceals facts that are material to the acceptance of the risk by the insurer. To bar recovery, the misrepresentation or omission must be:

> Material either to the acceptance of the risk or to the hazard assumed by the insurer [or the] insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.[22]

In other words, a misrepresentation or omission is material "if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."[23] "A misrepresentation is a question of fact when there is conflicting evidence and a question of law when the evidence is susceptible to only one interpretation."[24]

The initial application for the Axis Policy sought disclosure of "claims, suits or proceedings . . . made during the past five years against

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[22] 18 *Del. C.* § 2711.
[23] *Windsor-Mount Joy Mut. Ins. Co. v. Jones*, 2009 WL 3069695, at *3 (Del. Super.) (quoting *Smith v. Keystone Ins. Co.*, 2005 WL 791387, at *2 (Del. Super.)).
[24] *Id*. (citing Smith, 2005 WL 791387, at *2).

[UWL] . . .." This language is unambiguous. It is undisputed that UWL did not disclose its involvement in the January 2007 Arbitration or the February 2007 Action. The evidence only can be interpreted one way. Therefore, whether the omission was material is a question of law.

The Court finds that UWL made a material omission on the Axis Policy application. The Axis Policy covered UWL for liability stemming from its wrongful acts, specifically including "Wrongful Acts in performing Cyber and Technology Activities" defined as:

> "[U]nauthorized access to, unauthorized use of, tampering with or introduction of malicious code into data or systems," "repetitively accessing a website, under the control of an insured, with the intent to deny others access to such website or with the intent to cause such website's functionality to fail, including what is commonly referred to as denial of service attacks . . ..", and "analysis, design, programming or integration of information systems" and "marketing, selling, distributing, installing, maintaining and training in the use of electronic or computer related hardware and software."

The February 2007 Action, which involved allegations of breach of contract and copyright infringement, are claims that were material to Axis's acceptance of the risk.

It was reasonable to foresee that UWL's involvement in the January 2007 Arbitration and the February 2007 Action could lead to liability during the Axis Policy period. Ultimately, that is precisely what happened. The Court finds that Axis certainly would have considered this information in

determining whether to issue insurance to UWL. If Axis nonetheless would have issued UWL insurance, perhaps it would have done so at a premium. Therefore, UWL's involvement in "claims, suits, or proceedings" was material. Section 2711 prevents UWL from recovery under the Axis Policy.

Finally, it is worth noting that the January 2007 Arbitration and the February 2007 Action were dismissed *without* prejudice. There was a realistic possibility that the disputes would re-emerge.

Exclusion V.A.6 and Exclusion B.2

Axis argues that Exclusion V.A.6 and Exclusion B.2 bar coverage. Because the Court finds that the terms of the Axis Policy bar recovery and UWL's material omissions prevent recovery, it need not decide whether Exclusion V.A.6 and Exclusion B.2 bar coverage.

UWL and Greenwich's Cross-Motions for Summary Judgment

Parties' Contentions

UWL asserts that the language of the Greenwich Policy does not prevent coverage because Seacoast's 2009 Counterclaims are not related to the January 2007 Arbitration and the February 2007 Action. UWL argues that a claim made against an insured during the Greenwich Policy period cannot be "pushed backwards and out of the policy" because it relates to a claim made before the policy period, "unless the earlier claim had been

reported to another preceding Greenwich policy." UWL contends that the Interrelated Claims provision "reasonably can be read as designed to aggregate multiple claims within the same policy period for purposes of claim limits and deductibles . . .." Further, UWL asserts it did not misrepresent itself on the Greenwich Policy application. Assuming, *arguendo*, that it did misrepresent itself, UWL claims that the misrepresentation was not material. Finally, UWL argues that the Contract Exclusion and the Intellectual Property Exclusion do not bar coverage.

Greenwich responds that, because it provided a "claims made" policy, it does not cover claims made prior to the Greenwich Policy period. Greenwich contends that the plain language of the Greenwich Policy provides that it does not cover claims that relate to wrongful acts prior to the Greenwich Policy's inception. Therefore, Greenwich asserts, the Greenwich Policy does not cover Seacoast's 2009 Counterclaims because they relate to the January 2007 Arbitration and the February 2007 Action. Additionally, Greenwich argues that, because UWL did not disclose that it was involved in the January 2007 Arbitration and the February 2007 Action on the Greenwich Policy application, coverage is barred. Finally, Greenwich claims that the Contract Exclusion and the Intellectual Property Exclusion bar coverage.

The Terms of the Greenwich Policy Bar Coverage

Seacoast's 2007 and 2009 Counterclaims fall under the Greenwich Policy's definition of a "Claim." The Counterclaims both constitute a "written notice received by an Insured that [an] entity intends to hold [the] insured responsible for a Wrongful Act," and both constitute a "civil proceeding in a court of law or equity, or arbitration."

UWL's conduct before it secured the Greenwich Policy—refusing to pay Seacoast fees, failing to provide a sufficient number of qualified personnel to be trained by Seacoast, and deactivating Seacoast's VPN access—fall under the Greenwich Policy's definition of "Wrongful Acts" (accordingly, for the purposes of the Greenwich Policy, this conduct is also referred to as "UWL's 2006-07 Wrongful Acts"). Because UWL's 2006-07 Wrongful Acts caused Seacoast's 2007 Counterclaims, UWL's 2006-07 Wrongful Acts amount to an "alleged act, error, omission misstatement, misleading statement or breach of duty."

Additionally, UWL's conduct in December 2008 falls under the Greenwich Policy's definition of "Wrongful Acts." UWL refused to pay Seacoast the service and maintenance fees that Seacoast demanded, and again deactivated Seacoast's VPN access (accordingly, for the purposes of the Greenwich Policy, this conduct is also referred to as "UWL's 2008

Wrongful Acts"). Because UWL's 2008 Wrongful Acts brought about Seacoast's 2009 Counterclaims, UWL's 2008 Wrongful Acts amount to an "alleged act, error, omission misstatement, misleading statement or breach of duty."

Having concluded that UWL's 2006-07 Wrongful Acts constitute "Wrongful Acts," the Court must determine if UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts are interrelated.

The Greenwich Policy defines "Interrelated Wrongful Acts" as "[w]rongful Acts which are based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related or series of related facts, circumstances, situations, transactions or events." As set forth previously in this opinion, the Court found that UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts are fundamentally identical. Both involve a breach of the SLAR Agreement claim, a claim for copyright infringement or "hacking," and the same facts, circumstances, situations, transactions, and events. Therefore, the Court treats UWL's 2006 Wrongful Acts and UWL's 2008 Wrongful Acts as "Interrelated Wrongful Acts."

The Greenwich Policy also contains an "Interrelated Claims" provision: "All Claims arising from Interrelated Wrongful Acts shall be

deemed to constitute a single Claim and shall be deemed to have been made at the earliest time at which the earliest Claim is made or deemed to have been made . . .." Because Seacoast's 2007 Counterclaims and Seacoast's 2009 Counterclaims arise from UWL's 2006-07 Wrongful Acts and UWL's 2008 Wrongful Acts, which are interrelated, Seacoast's 2007 Counterclaims and Seacoast's 2009 Counterclaims are treated as a singled claim that was made in January 2007.

UWL argues that the Interrelated Claims provision "reasonably can be read as designed to aggregate multiple claims within the same policy period for purposes of claim limits and deductibles . . .." The Greenwich Policy does not indicate that the Interrelated Claims provision serves a particular purpose. Therefore, UWL's assertion is reasonable. However, it is clear that the Interrelated Claims provision also serves to aggregate multiple claims for the purposes of excluding claims that significantly relate to claims made prior to the policy period.

The Greenwich Policy is a Claims Made Policy, meaning that it "only applies to claims first made during the policy period . . .." Therefore, it does not cover Seacoast's 2009 Counterclaims. The unambiguous language of the Greenwich Policy deems Seacoast's 2009 Counterclaims to be first made in January 2007, before the policy period's inception on September 9, 2008.

UWL argues that a claim made against it during the Greenwich Policy period cannot be "pushed backwards and out of the policy" because it relates to a claim made before the policy period, "unless the earlier claim had been reported to a another preceding Greenwich policy." The Court finds UWL's argument unpersuasive. The unambiguous language in the Greenwich Policy does not require that the earlier claim be reported to a preceding Greenwich Policy in order to prevent coverage.

UWL's Omission Bars Coverage

Because UWL omitted its involvement with the January 2007 Arbitration and February 2007 Action in the Greenwich Policy application, it cannot recover under the Greenwich Policy. The Greenwich Policy application questioned whether "[d]uring the last 5 years, has any Insured known of, or been involved in any lawsuit, charges, inquiries, investigations or proceedings . . .." This language is unambiguous. It is undisputed that UWL did not disclose its involvement in the January 2007 Arbitration or the February 2007 Action. The evidence is susceptible to only one interpretation. Therefore, whether UWL's omission was material is a question of law.

The Court finds that UWL made a material omission on the Greenwich Policy application. Similar to the Axis Policy, the Greenwich

Policy was designed to protect UWL from liability stemming from its Wrongful Acts. Whether UWL was recently involved in lawsuits was a variable that Greenwich sought to consider when determining whether—and at what rate—to issue UWL an insurance policy. UWL's failure to disclose past involvement in "any lawsuit, charges, inquiries, investigations or proceedings" was material, preventing UWL from recovering pursuant to 18 *Del. C.* § 2711.

The Greenwich Policy Exclusions

Greenwich argues that the Contract Exclusion and the Intellectual Property Exclusion bar coverage. Because the Court finds that other terms of the Greenwich Policy bar recovery, and that UWL's omission bars recovery, it need not decide whether the Contract Exclusion or the Intellectual Property Exclusion bar coverage.

CONCLUSION

UWL is barred from recovering under the Axis Policy pursuant to its unambiguous language. Seacoast's 2007 and 2009 Counterclaims are part of a single Wrongful Act, and are deemed to have been first made prior to the inception of the Axis Policy. UWL also is barred from recovering under the Axis Policy because it omitted material information on the application for insurance coverage.

UWL is barred from recovering under the Greenwich Policy pursuant to its unambiguous language. Seacoast's 2007 and 2009 Counterclaims are part of Interrelated Wrongful Acts and are deemed to have been first made before the Greenwich Policy period. UWL also is barred from recovering under the Greenwich Policy because it omitted material information on the application for insurance coverage.

THEREFORE, United Westlabs, Inc.'s Motion for Summary Judgment against Axis Insurance Company is hereby **DENIED**. United Westlabs, Inc.'s Motion for Summary Judgment against Greenwich Insurance Company is hereby **DENIED**. Axis Insurance Company's Motion for Summary Judgment is hereby **GRANTED**. Greenwich Insurance Company's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

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