STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: August 10, 2017]

TEXTRON, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PB-2012-1371**
	:	**C.A. No. PC-2016-0587**
	:	**(Consolidated Cases)**[1]
TRAVELERS CASUALTY & SURETY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, and HANOVER INSURANCE COMPANY,	:	
	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court is Plaintiff Textron, Inc.'s (Textron) motion for partial summary judgment. Textron's motion is directed at one defendant, Travelers Casualty & Surety Company (Travelers), and limited to one issue: whether Travelers has a duty to defend Textron against seven asbestos-related personal injury lawsuits. The Court exercises jurisdiction pursuant to G.L. 1956 § 9-30-1.

I

Facts and Travel

Textron has been named as a defendant in a number of lawsuits alleging injuries resulting from asbestos exposure. Jack Aff. ¶¶ 3-4; Randle Aff. ¶¶ 2-3. To date, well over half of those lawsuits have been dismissed and a smaller fraction of them have been settled. Jack Aff. ¶ 4. Many of the lawsuits against Textron were brought in jurisdictions beyond Rhode Island's

[1] These matters were consolidated by order of the Court on August 31, 2016.

borders. See Randle Aff. ¶ 3. However, seven of them were filed in Rhode Island, in our Superior Court.[2] Jack Aff. ¶ 5. It is on those seven lawsuits (collectively, the R.I. Lawsuits) as to Travelers' duty to defend that Textron focuses its motion for partial summary judgment.

From January 1, 1966 to January 1, 1987, Textron was covered by comprehensive general liability insurance policies issued by the Aetna Casualty & Surety Company (Aetna), policies that Travelers has since acquired. Id. ¶ 14; see also Exs. 8, 9. Although there were various iterations of the insurance policies during those twenty-one years, Textron and Travelers agree that the operative language relating to coverage for personal injury liability largely remained the same. See Travelers' Opp'n to Textron's Mot. Partial Summ. J. 2 (Travelers' Mem.); Textron's Mem. of Law in Supp. of Textron's Mot. Partial Summ. J. Against Travelers 7 n.4 (Textron's Mem.); see also Exs. 8, 9.[3]

The insurance policies provide, in pertinent part, that "[Travelers] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . Personal Injury . . . to which this insurance applies, caused by an occurrence." Exs. 8, 9 § 2.1. Section 2.2—entitled "Defense: Settlement, Supplementary Payments"—states that "[Travelers] shall have the right and duty to defend any suit against the insured within the United States of America . . . seeking damages on account of such personal injury . . . to which this

[2] Those lawsuits are as follows: Carter v. A.C. Horn Co., PC-2008-1102; LaPierre v. 3M Co., PC-2011-1122; Weiland v. 3M Co., PC-2014-4430; Dalee v. Am. Standard, Inc., PC-2011-0011; Hannah v. Abex Corp., PC-2012-5580; Noble v. Am. Standard, Inc., PC-2013-1072; and Wood v. Aurora Pump Co., PC-2017-1317. Jack Aff. ¶¶ 6-12. Copies of the complaints from each of those lawsuits are attached as Exhibits 1-7 to the Jack Affidavit.

[3] Attached to the Jack Affidavit are the insurance policies from the periods January 1, 1967 to January 1, 1968, see Ex. 8, and January 1, 1986 to January 1, 1987, see Ex. 9. Travelers agrees with Textron's assertion that these two policies are representative of the policies that Travelers' predecessor, Aetna, provided Textron from January 1, 1966 to January 1, 1987. See Travelers' Mem. 2. However, as discussed herein, Travelers correctly points out that there are slight differences with respect to the policies' definitions of "personal injury" and "occurrence."

policy applies, even if any of the allegations of the suit are groundless, false or fraudulent . . . ." Exs. 8, 9 § 2.2. However, the insurance policies provided to the Court—Exhibits 8 and 9—differ in regard to their respective definitions of "personal injury" and "occurrence."

Exhibit 8—a policy that Travelers asserts is representative of the policies in effect from January 1, 1966 to January 1, 1972—defines "personal injury" as including, among other things, "bodily injury . . . ." Ex. 8 § 4.13. An "occurrence" is defined as "an accident, event or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury or property damage . . . ." Id. § 4.12. In Section 2.3, Exhibit 8 further provides that "[t]he policy applies only to: Personal Injury . . . which occurs during the policy period anywhere in the world[.]" Id. § 2.3.

On the other hand, Exhibit 9—a policy that Travelers asserts is representative of the policies in effect from January 1, 1973 to January 1, 1987—defines "personal injury" in a slightly different manner. In Exhibit 9, unlike in Exhibit 8, the definition of "occurrence" sheds its reference to a policy period limitation, a limitation that is included instead within the definition of "personal injury." Ex. 9 § 4.11 (defining an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage . . ."). A "personal injury" is defined as a "bodily injury . . . sustained by any person which occurs during the policy period." Id. § 4.12.

Textron, facing approximately 140 asbestos-related personal injury lawsuits, turned to Travelers—as well as to the other named defendant insurance companies—for reimbursement of its defense costs and indemnity from liability. Randle Aff. ¶ 3; Jack Aff. ¶ 4. According to Textron, Travelers initially aided Textron in its defense against those lawsuits. Jack Aff. ¶ 18. However, in 2012, Travelers stopped reimbursing Textron for defense costs. Id. ¶ 19.

Travelers denies that it has a duty to defend. According to Travelers, under both versions of the insurance policies—Exhibits 8 and 9—its duty to defend is not triggered unless the alleged asbestos-related personal injuries occurred during the policy period. In response to Travelers' refusal to defend and indemnify, Textron filed suit.[4] In Count I of its complaint, Textron "seeks a declaratory judgment that [Travelers and the other named defendant insurers] are obligated to defend and/or indemnify Textron . . . for past, present and future [bodily injury lawsuits] under each of the [p]olicies." Compl. ¶ 16.[5] On its motion for partial summary judgment, Textron seeks a declaration with respect to Travelers and whether Travelers alone has a duty to defend, leaving for another day the potential liability of the other defendants and the ultimate issue of indemnity.

II

Standard of Review

"It is a fundamental principle that '[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.'" Takian v. Rafaelian, 53 A.3d 964, 970 (R.I. 2012) (alteration in original) (quoting Emp'rs Mut. Cas. Co. v. Arbella Prot. Ins. Co., 24 A.3d 544, 553 (R.I. 2011)). With that in mind, in ruling on a motion for summary judgment, the Court is instructed to "review[] the evidence and draw[] all reasonable inferences in the light most favorable to the nonmoving party," id. (citation omitted) (internal quotation marks omitted), and to "'look for factual issues, not determine them.'" Steinhof v. Murphy, 991 A.2d 1028, 1032-33 (R.I. 2010) (quoting Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981)).

[4] In its complaint, Textron alleges three counts: (1) Declaratory Judgment Against All Defendants; (2) Breach of Contract Against Travelers; and (3) Breach of Implied Covenant of Good Faith and Fair Dealing Against Travelers. See generally Compl. ¶¶ 15-31. On this particular motion, Textron moves only for partial summary judgment against Travelers with respect to whether Travelers has a duty to defend, an issue that is only a part of Count I.

[5] In Count I, Textron seeks several other declarations, but they need not be detailed here.

However, summary judgment is appropriate "'if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" Takian, 53 A.3d at 970 (quoting Classic Entm't & Sports, Inc. v. Pemberton, 988 A.2d 847, 849 (R.I. 2010) (internal citation omitted)); see Super. R. Civ. P. 56(c).

III

Discussion

Travelers opposes Textron's motion for partial summary judgment on two grounds: (a) the motion is procedurally improper; and (b) pursuant to the governing insurance policies, Travelers does not owe Textron a duty to defend.[6] The Court addresses each of Travelers' grounds for opposition in turn.

A

Whether Partial Summary Judgment Is Procedurally Proper

Textron's motion for partial summary judgment is directed at only one defendant, Travelers. With respect to Travelers alone, Textron points to only one count of the complaint, Count I—a count that contains multiple requests for declaratory judgments. Homing in on Count I, Textron slices off a single declaration: whether Travelers has a duty to defend in the asbestos-related personal injury lawsuits. Textron then narrows its motion further, asking the Court to determine whether Travelers has a duty to defend against only seven of the nearly 140 asbestos-related personal injury complaints. Textron's motion therefore concerns only one defendant and addresses only a portion of the asbestos complaints, which fall under only one part of one count

[6] Prior to oral argument on this motion, Travelers also opposed it on the basis that there are outstanding issues of material fact with respect to how "typical" the R.I. Lawsuits are when compared to all of the asbestos lawsuits against Textron. However, with clarification from Textron's counsel that the present motion is aimed solely at the R.I. Lawsuits, the Court need not address that argument.

of the complaint. In opposing Textron's motion, Travelers argues that Textron's motion is procedurally improper because it takes an inappropriately narrow and piecemeal approach to a complex case. Therefore, as a threshold matter, the Court must determine whether Textron's motion is procedurally proper and consequently, with respect to summary judgment, how partial is too partial.

Rule 56(a) of our Rules of Civil Procedure provides that "[a] party seeking . . . to obtain a declaratory judgment may . . . move . . . for a summary judgment in the party's favor upon all or any part thereof." Clearly the plain language of Super. R. Civ. P. 56(a) supports the proposition that Textron may move for partial summary judgment on part of its declaratory judgment action. What is not as clear, however, is whether Textron's attempt to further narrow the scope of its declaratory judgment action is appropriate at this juncture. In support of the argument that Textron should not be allowed to move as it has, Travelers cites to several cases which it argues show that summary judgment cannot be entered for a portion of a single claim in a suit. See, e.g., Testa v. Janssen, 492 F. Supp. 198, 204 (W.D. Penn. 1980) (stating that "[t]he Federal Rules of Civil Procedure do not authorize partial summary judgment for a portion of a single claim"). In its memorandum, quoting from a Rhode Island Superior Court case, Travelers asserts that ruling on Textron's motion "'would contravene the purpose of summary judgment, namely judicial efficiency.'" Rowey v. Children's Friend and Serv., No. C.A. 98-0136, 2003 WL 23196347 (R.I. Super. Dec. 12, 2003) (quoting Dalton v. Alston & Bird, 741 F. Supp. 1322, 1337 (S.D. Ill. 1990)).

As a general point of law, this Court has the authority to enter partial summary judgment. Genao v. Litton Loan Servicing, L.P., 108 A.3d 1017, 1020 n.6 (R.I. 2015); see Super. R. Civ. P. 56(a). Assuming there is no genuine issue of material fact and the movant shows it is entitled to

judgment as a matter of law, a determination on whether to grant a partial summary judgment motion is left to this Court's discretion. Coro, Inc. v. R. N. Koch, Inc., 112 R.I. 371, 378, 310 A.3d 622, 626 (1973). Furthermore, after a review of the case law in this jurisdiction and those cases to which Travelers has cited, there appear to be two primary considerations when determining the propriety of a motion for partial summary judgment: time and judicial efficiency. See id. at 380, 310 A.3d at 627; see also Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund, 778 F.3d 593, 606 (7th Cir. 2015) (explaining that "[a] request for partial summary judgment can serve a useful brush-clearing function even if it does not obviate the need for a trial, and it may also facilitate the resolution of the remainder of the case through settlement" while noting "that a party should not pursue a needlessly piecemeal litigation strategy") (internal citation omitted).

Here, the Court finds that ruling on Textron's motion is in the interest of time and of judicial efficiency. See Coro, Inc., 112 R.I. at 380, 310 A.3d at 627; Hotel 71 Mezz Lender LLC, 778 F.3d at 606; see also Super. R. Civ. P. 56(a). In this case, Textron seeks defense cost reimbursement and indemnity on nearly 140 asbestos-related personal injury lawsuits. See Randle Aff. ¶ 3. Including the R.I. Lawsuits, Textron has faced or is facing potential liability in fifteen jurisdictions across the country. Id. Counsel for Textron and Travelers acknowledge that given the jurisdictional diversity of those lawsuits, there are many choice-of-law issues remaining in this case going forward. Textron, purportedly in the interest of moving the case along, has moved for partial summary judgment on only the R.I. Lawsuits, cases in which neither party disputes that Rhode Island law applies. Though perhaps unique in its narrow scope, Textron's motion targets a straightforward issue: whether Travelers has a duty to defend. Judicial efficiency is in no way disturbed, nor is the overall case delayed by ruling on that issue.

In fact, the carving off of these lawsuits is consistent with the "brush-clearing" function that partial summary judgment helps perform. See Hotel 71 Mezz Lender LLC, 778 F.3d at 606.

Additionally, the cases to which Travelers cites miss the mark. In Testa, the court stated that "[t]he Federal Rules of Civil Procedure do not authorize partial summary judgment for a portion of a single claim." Testa, 492 F. Supp. at 204. From another case, Travelers notes "federal practice does not provide for 'partial' summary judgment." Patrick Schaumburg Autos., Inc. v. Hanover Ins. Co., 452 F. Supp. 2d 857, 866 (N.D. Ill. 2006). However, of import to this analysis is the fact that the Federal Rules of Civil Procedure have since been amended to explicitly authorize a motion for partial summary judgment. See Fed. R. Civ. P. 56(a).[7] That fact vitiates Travelers' assertion that a court lacks the power, under the Federal Rules of Civil Procedure, to grant a motion for partial summary judgment. Again, Rule 56(a) of our Rules of Civil Procedure allows for a party to move for summary judgment on part of a declaratory judgment; our Supreme Court has similarly opined on such motions without questioning their procedural propriety. See, e.g., Coro, Inc., 112 R.I. at 378-79, 310 A.2d at 626. Indeed, our Supreme Court has expressly noted that Super. R. Civ. P. 56, read in conjunction with Super. R. Civ. P. 54(b), authorizes the entry of partial summary judgment. Genao, 108 A.3d at 1020 n.6.[8] Thus, absent delay or judicial inefficiency, this Court has the discretion to consider a party's

[7] Furthermore, the cases that hold "there can be no summary judgment on part of a single claim" were decided well prior to the amendment of Fed. R. Civ. P. 56(a) which expressly authorized partial summary judgment. See E.H. Schopler, Annotation, Propriety of Summary Judgment on Part of Single of Multiple Claims, 75 A.L.R. 1201 (1961).

[8] Rule 56(c) of the Superior Court Rules of Civil Procedure also provides that "[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Here, tracking the language of Super. R. Civ. P. 56(c), Textron seeks summary judgment on the issue of Travelers' duty to defend alone although there are genuine issues remaining with respect to indemnity, among other things. The Court concludes that this language, which contemplates the resolution of partial issues on summary judgment, also supports the conclusion that Textron's motion is appropriate.

motion for partial summary judgment, even one that carves off a single part of a declaratory judgment count.

Simply put, Textron's motion is not too partial to preclude summary judgment. This Court's conclusion is bolstered by the above-quoted text of Super. R. Civ. P. 56(a), which provides that "[a] party seeking . . . to obtain a declaratory judgment may . . . move . . . for a summary judgment in the party's favor upon all or any part thereof." (Emphasis added.) That text, coupled with the dual interests of time and judicial efficiency—see Hotel 71 Mezz Lender LLC, 778 F.3d at 606—supports the finding that Textron's motion is proper at this time.

B

Whether Travelers Owes Textron a Duty to Defend Against the R.I. Lawsuits

Next, Travelers disagrees with a key charge of Textron's motion: whether Travelers is obligated to defend Textron in the R.I. Lawsuits. "Under Rhode Island law, an insurer's duty to defend is broader than its duty to indemnify." Emp'rs Mut. Cas. Co. v. PIC Contractors, Inc., 24 F. Supp. 2d 212, 215 (D.R.I. 1998) (citing Mellow v. Med. Malpractice Joint Underwriting Ass'n, 567 A.2d 367, 368 (R.I. 1989)). As our Supreme Court has explained, "'[i]n general, the duty to defend an insured in this jurisdiction is determined by applying the pleadings test.'" Progressive Cas. Ins. Co. v. Narragansett Auto Sales, 764 A.2d 722, 724 (R.I. 2001) (internal quotation marks omitted) (quoting Peerless Ins. Co. v. Viegas, 667 A.2d 785, 787 (R.I. 1995)). The pleadings test requires a court "to look at the allegations contained in the complaint, and 'if the pleadings recite facts bringing the injury complained of within the coverage of the insurance policy, the insurer must defend irrespective of the insured's ultimate liability to the plaintiff.'" Id. Put another way,

> "[I]n determining whether a duty to defend exists, there is no need to resolve any factual issues. The determination involves 'nothing

> more than comparing the allegations in the complaint with the terms of the policy. If the facts alleged in the complaint fall within the risks covered by the policy, the insurer is obligated to defend. Otherwise, it is not.'" PIC Contractors, Inc., 24 F. Supp. 2d at 215 (quoting Aetna Cas. & Sur. Co. v. Kelly, 889 F. Supp. 535, 541 (D.R.I. 1995)).

Therefore, if the factual allegations contained in the complaint raise the potential for coverage under the insurance policy's risk of coverage, then the insurer has a duty to defend. Emhart Indus., Inc. v. Home Ins. Co., 515 F. Supp. 2d 228, 236 (D.R.I. 2007) (hereinafter Emhart) (collecting cases).[9]

Applying the pleadings test here, the Court looks at the seven complaints filed in the R.I. Lawsuits, see Exs. 1-7, to see whether the factual allegations contained therein potentially fall within Travelers' insurance policies, see Exs. 8-9. See also Narragansett Auto Sales, 764 A.2d at 724; Emhart, 515 F. Supp. 2d at 237; PIC Contractors, Inc., 24 F. Supp. 2d at 215. In short, the Court is instructed to compare the allegations set forth in Exhibits 1-7 with the language of Exhibits 8 and 9. Travelers argues that the plain language of the insurance policies requires the R.I. Lawsuits to allege personal injuries that occurred during the policy period, January 1, 1966 to January 1, 1987. Otherwise, according to Travelers, the complaints in those lawsuits fall outside the potential for coverage and Travelers owes Textron no duty to defend. Conversely, Textron contends that the R.I. Lawsuits' complaints do raise the potential for coverage under the insurance policies. According to Textron, Travelers is obligated to defend even if the possibility

[9] In Emhart, the federal district court detailed an apparent discrepancy in the way Rhode Island courts have articulated the standard in duty-to-defend cases. Emhart, 515 F. Supp. 2d at 236-37. There, the court explained that some courts—including the court in PIC Contractors, Inc., 24 F. Supp. 2d at 215—refer to the duty-to-defend standard as the "reasonable possibility" standard, while others refer to it as the "potential-for-coverage" standard. Emhart, 515 F. Supp. 2d at 236-37. Although there appears to be some dispute in the case law as to which articulation controls, id.—or whether it even matters which one controls, see id. at 237 n.13—in this case the Court will follow the "potential-for-coverage" formulation of the duty-to-defend standard.

exists that Travelers may ultimately discover facts proving that the R.I. Lawsuits' plaintiffs suffered their injuries outside the duration of the policy period. For purposes of this summary judgment motion, the Court assumes arguendo that Travelers' interpretation of the insurance policies controls.

After examining the complaints in the R.I. Lawsuits, the Court finds that those complaints do allege bodily injuries that potentially occurred during Travelers' policy period. Compare Ex. 8 §§ 2.1, 2.2, 4.12, 4.13 and Ex. 9 §§ 2.1, 2.2, 4.11, 4.12 with Ex. 1 ¶¶ 1-6, 12, 50; Ex. 2 ¶¶ 1-5, 7, 44; Ex. 3 ¶¶ 1-8, 12; Ex. 4 ¶¶ 5-6; Ex. 5 ¶¶ 5-6;[10] Ex. 6 ¶¶ 5-6; and Ex. 7 ¶¶ 1, 43. Therefore, the result of the pleadings test conclusively establishes that Travelers has a duty to defend Textron in the R.I. Lawsuits. Although Travelers' reading of the insurance policies would require a personal injury to have occurred during the policy period to trigger coverage, in the R.I. Lawsuits' complaints there are no allegations that show the injuries alleged occurred outside the policy period from January 1, 1966 to January 1, 1987. Even for those plaintiffs who alleged a specific time period of contracting asbestosis, the potential for coverage is nevertheless present. Such a potential for coverage is all that is needed to trigger the duty to defend. See Narragansett Auto Sales, 764 A.2d at 724; Emhart, 515 F. Supp. 2d at 237; PIC Contractors, Inc., 24 F. Supp. 2d at 215. Moreover, Travelers' obligation to defend in the R.I. Lawsuits persists even if there are facts that may someday negate Travelers' ultimate liability to indemnify Textron. As our Supreme Court has emphasized, "'the insurer must defend irrespective of the insured's ultimate liability to the plaintiff.'" Narragansett Auto Sales, 764 A.2d at 724 (quoting Viegas, 667 A.2d at 787)).

[10] The Exhibit 5 plaintiffs filed three amended complaints, all of which are included in Exhibit 5. The Court cites to the Third Amended Complaint from that case, but notes that there are no differences as to the asbestos-related personal injuries alleged in any of the iterations of the complaints in Exhibit 5.

As a last salvo, Travelers argues that this Court should apply the manifestation trigger-of-coverage rule—a rule that our Supreme Court has interpreted to mean "that coverage under a general liability policy is triggered by an occurrence that takes place when property damage . . . manifests itself or is discovered or in the exercise of reasonable diligence is discoverable." CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647, 650 (R.I. 1995). Applying that rule, Travelers insists that the trigger-of-coverage language in its insurance policies requires allegations that the plaintiffs' personal injuries manifested themselves or were discovered during the policy period. However, even assuming arguendo that such a rule applied in this case, under the pleadings test, only a potential for coverage is required. See Narragansett Auto Sales, 764 A.2d at 724; Emhart, 515 F. Supp. 2d at 237. As belabored above, nothing in the complaints in Exhibits 1 through 7 negates Travelers' duty to defend. The complaints contain factual allegations that potentially fall under Travelers' insurance policies; nothing more is needed to trigger the duty to defend. At this juncture, where the pleadings do not show otherwise and indemnity is not yet at issue, whether the injuries actually manifested themselves during the policy period is irrelevant to the duty-to-defend analysis. PIC Contractors, Inc., 24 F. Supp. 2d at 216-17.

IV

Conclusion

In sum, the Court finds that Textron's motion for partial summary judgment is procedurally proper and declares that Travelers' duty to defend has been triggered with respect to the R.I. Lawsuits. Accordingly, without any genuine issue of material fact as to whether the factual allegations in the R.I. Lawsuits' complaints raise the potential for coverage under Travelers' insurance policies, and because the Court finds that Textron is entitled to judgment as

a matter of law as to whether Travelers has a duty to defend in the R.I. Lawsuits, the Court grants Textron's motion for partial summary judgment. See Takian, 53 A.3d at 970; Super. R. Civ. P. 56(c). Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Textron, Inc. v. Travelers Casualty & Surety Company, et al.
CASE NO:	PB-2012-1371, PC-2016-0587 (consolidated cases)
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 10, 2017
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
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