IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THE PREMCOR REFINING GROUP, INC., and **VALERO ENERGY CORPORATION**	)	
	)	CIVIL ACTION NUMBER
	)	07C-01-095-JOH
Plaintiffs	)	
v.	)	
MATRIX SERVICE INDUSTRIAL CONTRACTORS, INC., MATRIX SERVICE COMPANY, PRO-TECH ENGINEERING, INC., AMERICAN HOME ASSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., and **MARYLAND CASUALTY COMPANY**	)	
Defendants	)	
v.	)	
CATALYST HANDLING SERVICE CO., LLC	)	
Third-Party Defendants	)	

Submitted: January 8, 2009
Decided: March 19, 2009

MEMORANDUM OPINION

Upon Motion of Maryland Casualty Company for Summary Judgment - ***DENIED***

Appearances:

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Thomas H. Kovach, Esquire, of Parkowski Guerke & Swayze, Wilmington, Delaware, Jonathan M. Preziosi, Esquire, Jeffrey Carr, Esquire, Stephanie L. Merk, Esquire, of Pepper Hamilton, LLP, Attorneys for defendant/third-party plaintiffs Matrix Industrial Contractors, Inc., and Matrix Service Company

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HERLIHY, Judge

In this coverage action, defendant, Maryland Casualty Company ("Maryland Casualty") has moved for summary judgment against the plaintiffs The Premcor Refining Group, Inc. and Valero Energy Corporation (herein, for purposes of this opinion, collectively referred to as "Premcor"). Premcor filed an amended complaint with this Court on December 13, 2007 alleging claims against Maryland Casualty for (1) breach of a duty to defend; (2) breach of the duty to indemnify; (3) implied breach of the covenant of good faith and fair dealing; and (4) bad faith in its dealings with Premcor. Premcor asserts Maryland Casualty breached these contractual duties by failing to recognize Premcor as an additional insured to an insurance policy entered into by Maryland Casualty and Pro-Tech Engineering, Inc. ("Pro-Tech"). Premcor seeks defense and indemnification from Maryland Casualty as a result of two underlying wrongful death actions that have been filed against it in the Eastern District of Pennsylvania. Maryland Casualty argues it has no duty to defend or indemnify Premcor. Accordingly, it asks this Court to grant summary judgment. The motion is GRANTED in part and DENIED in part.

Factual Background

Premcor's complaint in this case arises from two underlying lawsuits brought against Premcor in the U.S. District Court for the Eastern District of Pennsylvania ("Pennsylvania lawsuits"). Both lawsuits make wrongful death claims against Premcor. The plaintiffs in the two suits are from the respective estates of two men, John J. Ferguson

Jr. ("Ferguson") and John A. Lattanzi ("Lattanzi"), who were working at Premcor's Delaware City Refinery on November 5, 2005. Both Ferguson and Lattanzi were Boilermakers Union members who obtained employment in the past through Matrix Service Company ("Matrix"). During the period of time significant to these proceedings, Ferguson and Lattanzi were hired out to Pro-Tech through Matrix for construction work. In turn, Pro-Tech directed both men to Premcor's Delaware City Refinery.

On November 5, 2005, Ferguson and Lattanzi were working at the refinery under the direction of their boss, William Pyatt, a Pro-Tech employee. That night, they were directed to move an elbow pipe as a part of a turnaround project. The project involved the moving of industrial sized pipes in order to facilitate the oil refining process. During the job, Ferguson discovered a misplaced roll of duct tape within the elbow. He attempted to fish it out with a wire; however, he passed out and fell into the pipe. As a result, Lattanzi attempted to rescue Ferguson by entering the pipe. Neither man knew the elbow pipe had been purged with nitrogen making the interior of the pipe an oxygen-depleted environment. Consequently, both men asphyxiated to death when entering the pipe.

Prior to working on the refinery's turnaround project, Pro-Tech and Premcor had entered into a National Service Agreement (NSA) governing the relationship between the parties while Pro-Tech worked at Premcor's facilities. The turnaround project was guided by the terms of this agreement. The NSA stipulated that Pro-Tech was a independent contractor when it was on Premcor's properties. Another portion of the NSA charged Pro-

Tech with obtaining insurance for the benefit of both Pro-Tech and Premcor.[1]

To fulfill that contractual duty, Pro-Tech obtained a commercial general liability policy from Maryland Casualty. Maryland Casualty's policy, setting forth liability coverage, states:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.[2]

The policy entered into by Maryland Casualty and Pro-Tech has an additional section entitled, "Who Is an Insured." It is this section that Premcor believes entitles it to a defense from Maryland Casualty as an additional insured party. The policy reads:

> Any person or organization with whom you agree, because of a written contract to provide insurance such as is afforded under this policy, but only with respect to liability arising out of your operations, "your work" or facilities owned or used by you.[3]
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> "Your work" means:
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> a. Work or operations performed by you or on your behalf; and

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[1] Def.'s Ex. C. at ¶ 11.1.

[2] Def.'s Ex. D. at § I ¶ 1.a.

[3] *Id.* at § II ¶ 2.e.

b. Materials, parts or equipment furnished in connection with such work or operations.

"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.[4]

The original complaints of the underlying Pennsylvania lawsuits were filed on February 3, 2006 (Ferguson) and February 21, 2006 (Lattanzi). Premcor attempted to tender the Pennsylvania lawsuits to Maryland Casualty based on the policy between Maryland Casualty and Pro-tech. Premcor considered itself to be an additional insured based on the policy language. In a March 27, 2006 letter, Maryland Casualty denied coverage. After amended complaints were filed, Premcor again attempted to tender the defense to Maryland Casualty which was also denied on June 20, 2007. Maryland Casualty refused Premcor's request citing its belief that the policy was not triggered because Pro-Tech's involvement at the refinery did not cause or bring about the death of Ferguson or Lattanzi. In sum, Maryland Casualty did not view the accidental deaths of the two men as "arising out of" Pro-Tech's involvement at the refinery. Therefore, Maryland Casualty denied defense and/or indemnification to Premcor as an additional insured under its policy with Pro-Tech.

[4] *Id.* at § V ¶ 21.

Premcor has brought forward all of the allegations in the Pennsylvania lawsuits it contends triggers Maryland Casualty's duty to defend. In Ferguson's amended complaint, the following allegations are made:

> 49. Paragraph (d)(11) requires the host employer, Valero and/or Premcor, to develop and implement procedures to coordinate entry operations when employees of more than one employer are working simultaneously as authorized entrants in the permit space, so that employees of one employer do not endanger the employees of any other employer.
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> 50. In regard to the permit system for permits issued by the Valero and/or Premcor operators, OSHA requires that any permits be canceled when: a condition that is not allowed under the entry permit arises in or near the permit space. *See* § 1910.146(e)(5)(ii).
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> 53. OSHA further has issued regulations regarding the obligation of operator/owners such as Valero and/or Premcor to ensure safe work practices by contractors, communication of hazards to and among contractors, coordination and safety management in multi-contractor worksites, site safety training and compliance for contractors, safety inspection and safety compliance by contractors, and it is believed that Valero and/or Premcor violated these regulations and failed to ensure a safe work site on November 5-6, 2005. *See* 29 CRF §§ 1910.110, 1910.147, 1910.1200 *et seq*.
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> 54. Had Valero and/or Premcor implemented the above mentioned OSHA regulations, the accident and death of John Jerry Ferguson, Jr. could not have occurred.
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> ***
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> 80. Defendants were negligent, careless, willful, wanton and reckless, and engaged in intentional malicious conduct with a conscious disregard for human life, resulting in the death of John Jerry Ferguson, Jr., as set forth above as follows:

a. failing to warn John Jerry Ferguson, Jr. of the dangers of an active nitrogen purge on the deck of Reactor 1 in the area to which he had been assigned;

d. failing to provide appropriate contractor training and oversight to ensure the worker's safety;

q. failing to ensure: communication of hazards to and among all contractors; site training for all contractor's to ensure safe job performance by contractors under their control in a multi-contractor work setting; and, uniform nitrogen purge procedures at their refineries throughout the United States.[5]

In the Lattanzi action, the amended complaint contains the following allegations:

65. The negligence and/or recklessness of Defandants, Valero and/or Premcor, its agents, servants, and employees consisted, *inter alia*, of the following:

g. negligent and/or reckless failure to properly inspect and supervise the work on Unit 36;

q. negligent and/or reckless hiring, supervision, or retention of, employees, and outside contractors;

s. negligent and/or reckless policies and/or procedures relating to the rescue of injured workers;

v. negligent and/or reckless failure to warn Plaintiffs' decedent of the dangerous conditions and risks involved;

z. negligent and/or reckless failure to comply with industry and government safety standards and regulations.[6]

Notably, the plaintiffs in the Pennsylvania lawsuits did not name Pro-Tech as a

[5] Pls.' Reply Br. Ex. 1.

[6] Pls.' Reply Br. Ex. 2.

defendant in their wrongful death suits. Instead, they simply named Premcor and Valero as defendants. Nor has Pro-Tech been added by the defendants as a third-party defendant at the conclusion of the pleading stage of that litigation. Apparently, Premcor moved to have Pro-Tech joined as a third-party defendant but failed.[7] As of the writing of this opinion, one of the Pennsylvania lawsuits has settled and the other is scheduled for trial in the near future.

In addition to alleging Maryland Casualty has breached its duties to defend and/or indemnify, Premcor alleges Maryland Casualty has acted in bad faith and has breached the covenant of good faith and fair dealing. Premcor claims it made many requests to Maryland Casualty to get copies of its policy with Pro-Tech. These requests were turned down, it asserts, for nearly fifteen months. Premcor says Maryland Casualty replied Premcor was not an insured. Maryland Casualty released the policies only five days prior to the mediation of the Pennsylvania actions. The day after it received the policies, Premcor said it again demanded coverage from Maryland Casualty. It also requested Maryland Casualty attend the mediation sessions, although in the end an attorney representing Maryland Casualty did. Subsequent communications did not change Maryland Casualty's position. Premcor also alleges Maryland Casualty undertook an inadequate investigation of the fatal events relying solely on an interview with a Pro-Tech employee, notably Pyatt.

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[7] Although this Court does not consider the reasons behind the Pennsylvania's court decision, counsel for Maryland Casualty referenced that the motion was rejected because it was untimely filed.

Parties' Contentions

Maryland Casualty argues that it is entitled to summary judgment against Premcor because the underlying complaints foreclose any possibility of liability on the part of Pro-Tech. Therefore, it argues the "arising out of your work" language within their policy with Pro-Tech cannot be triggered and, in turn, this precludes any possibility of Premcor receiving a defense or indemnification. Maryland Casualty contends the language within the policy concerning the "arising out of" paragraph is clear and unequivocal. Applying the "arising out of" language, Maryland Casualty asserts that Premcor cannot make a showing of meaningful linkage between Pro-Tech's work and Premcor's involvement because of the lack of allegations against Pro-Tech in the Pennsylvania lawsuits.

Further, Maryland Casualty argues that because it has no duty to defend, it also has no duty to indemnify Premcor. Maryland Casualty contends if there is no duty to defend, then there is no duty to indemnify because the former is necessarily broader than the latter. Finally, if there is neither a duty to defend or indemnify, Maryland Casualty also contends the Court may dismiss Premcor's bad faith and breach of covenant claims.

Premcor contends the allegations in the underlying Pennsylvania lawsuits hold a possibility that liability could arise from Pro-Tech's involvement at Premcor's refinery leading to the two deaths. Premcor points to the two Pennsylvania complaints which allege "negligent coordination of work" and "improper contractor oversight, supervision and hiring" between Premcor contractors (no names mentioned) during the turnaround process.

Premcor also asserts that the Court can go outside the allegations found inside the complaints and consider additional facts when deciding Maryland Casualty's motion. It contends that because discovery has taken place in the Pennsylvania lawsuits, the Court does not have to constrain its analysis of the duty to defend solely to the allegations of the complaint. Consequently, Premcor argues that Maryland Casualty has tried to disavow certain facts concerning Pyatt's role in the fatal incident by refusing to produce Pyatt for another deposition.[8] It claims that a new deposition is required because of newly discovered facts revolving around potential coordination between Premcor and Pro-Tech that may be relevant during the Court's "arising out of" analysis of the insurance policy's language.

Additionally, because Premcor disputes Maryland Casualty's argument that it had no duty to defend, it also disputes Maryland Casualty's contention that it has no duty of indemnification. Premcor maintains the duty to indemnify is based on facts concerning the insured's (Pro-Tech's) liability. Premcor disagrees with Maryland Casualty's argument that, when there is no duty to defend based on the allegations of the complaint, there must also be no duty to indemnify. Instead, Premcor argues the two duties, while being substantially related, are independent of each other and, therefore, preclude summary judgment.

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[8] While the Court had this motion under advisement, Premcor moved to compel the taking of Pyatt's deposition for this case. He had been deposed in the Pennsylvania lawsuits. But Premcor made it clear this second deposition was not needed for purposes of the Court's resolution of Maryland Casualty's summary judgment motion.

Premcor also rejects Maryland Casualty's reasoning that it cannot be found liable for bad faith or failure to act in good faith and fair dealing due to the fact the allegations on the complaint preclude a duty to defend or indemnify. Premcor maintains summary judgment is not appropriate for these allegations because Maryland Casualty's summary judgment arguments for duty to defend and duty to indemnify fail. Premcor lists various facts it argues in which a reasonable jury could find in favor of Premcor.

Applicable Standard

In order for the moving party to obtain summary judgment, it bears the burden of showing the Court that no genuine issue of material fact is present and that it is entitled to judgment as a matter of law.[9] When considering a motion for summary judgment, the Court must view the facts and circumstances in a light most favorable to the non-moving party.[10] However, if the moving party shows no conflict, the burden then shifts to the non-moving party to show some material dispute in the factual record.[11] The Court is required to examine the whole record including pleadings and affidavits.[12] Summary judgment is inappropriate when the record needs further development.[13] When the moving party can

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[9] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[10] *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 280. (Del. 2006).

[11] *Moore* at 680.

[12] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver Inc.*, 312 A.2d 322, 325. (Del. Super. 1973)

[13] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

establish that there is no genuine issue of material fact, summary judgment may be appropriate.[14]

Discussion

A

Duty to Defend

The first issue before the Court is whether Maryland Casualty has a duty to defend Premcor in the underlying Pennsylvania lawsuits. "[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."[15] Here, the complaints are the wrongful death suits in Pennsylvania. However, Premcor has argued the Court, in this particular case, should look outside the underlying pleadings and consider information obtained through the current discovery elicited during the wrongful death cases. The preliminary issue, then, is whether the Court should constrain itself to the allegations within the complaints in these two cases when considering the question of the duty to defend.

Premcor acknowledges that a traditional duty to analysis centers solely on the allegations of the complaints. The practical purpose behind such a rule has been to

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[14] *Pryor v. Aviola*, 301 A.2d 306, 308 (Del. Super. 1973).

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

establish as early as possible the parties that will be responsible for the litigation of the case.[16] Although Premcor has maintained it can show allegations within the two underlying complaints that trigger a duty to defend, it alternatively argues the Court may go outside the "four corners" of the two complaints and entertain facts beyond those alleged to determine if the duty exists.

Premcor contends *Pike Creek Chiropractic Center v. Robinson*[17] and *American Ins. Group v. Risk Enter. Mgmt. Ltd.*,[18] provide for the necessary framework for this Court to circumvent the traditional "four corners" rule. In *Pike Creek*, the Delaware Supreme Court allowed extrinsic facts for the resolution of an employment contract dispute which centered upon indemnification issues. The Supreme Court decided to allow additional information outside of the pleadings because the merits of the underlying case had already been decided. As a result, the Court found it practical to look outside the original complaint to resolve the indemnification issue. For indemnification, the Court held, it is best to look at the indemnitee's actual conduct and not how a third-party constructs a complaint.[19] However, *Pike Creek* did not consider duty to defend issues.

In *American Ins. Group*, the Supreme Court allowed a reviewing court to entertain

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

[17] 637 A.2d 418 (Del. 1994).

[18] 761 A.2d 826 (Del. 2000).

[19] *Pike Creek*, 637 A.2d at 421.

facts outside the complaint to ascertain whether a duty to defend existed. However, the decision of *American Ins. Group* revolved around a unique set of facts. In that case, the party seeking defense as an additional insured tendered their defense request three and half years after the initial complaint had been filed. In *American Ins. Group* case, as well as *Pike Creek*, the underlying case had already resolved and a complete discovery record had been developed.

While these cases are illustrative of the times when it may be proper for courts to consider outside information beyond the underlying complaint, this Court finds the facts of the case *sub judice* do not compel such a result. One reason for such a conclusion is based upon the fact that one of the underlying complaints in Pennsylvania is still pending and has not resolved (according to Maryland Casualty at oral argument on its motion). Furthermore, unlike *American Ins. Group*, Premcor tendered a timely defense request to Maryland Casualty shortly following the initial complaints and, again, after the amended complaints were filed. Also, it is unclear whether the discovery for either or both of the Pennsylvania lawsuits would be helpful on the issue of the duty to defend. Therefore, the Court's analysis will be contained to the allegations of the amended complaints.

With the Court's scope set on the pleadings of the underlying complaints in Pennsylvania, it must now determine whether Maryland Casualty can show there is no possibility for Premcor to qualify as an additional insured based upon the contractual language found in the policy between Pro-Tech and Maryland Casualty. The Delaware

Supreme Court in *Pacific Ins. Co. v. Liberty Mutual Ins. Co.*[20] has iterated the framework a court is to apply when considering whether coverage is triggered.

> 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 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.[21]

Both parties agree the pertinent contractual language states that Maryland Casualty will provide additional coverage for Premcor "only with respect to liability arising out of [Pro-Tech's] operations."[22]

In Delaware, the phrase "arising out of" is unambiguous in contract interpretation.[23] The Delaware Supreme Court has interpreted the phase, in the context of insurance policies, to require meaningful linkage between the insured's work and operations to that of the additional insured's risk.[24]

In *Pacific*, the Delaware Supreme Court was afforded an opportunity further embellish the meaningful linkage standard. In that opinion, the Court cited, with favor,

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[20] *Pacific* at 1254-55.

[21] *Id.*

[22] Def.'s Ex. D. at § II ¶ 2.e.

[23] *Pacific*, 956 A.2d at 1256.

[24] *Id.*

other standards employed by other states such as: "growing out of," "flowing from," "done in connection with," "broader than caused by," and "originating from."[25] As the aforementioned language makes clear, a party seeking to become an additional insured through use of the "arising out of" phrase is a typically low and a relatively easy standard to meet. To become an additional insured a party need only point to an allegation in the underlying complaint "show[ing] a potential that liability within coverage will be established."[26]

The *Pacific* case is illustrative of the low standard required to establish meaningful linkage in Delaware. In *Pacific*, there were two named co-defendants, Conrail and James Julian, Inc. The underlying complaints against them were two wrongful death lawsuits stemming from two separate motor vehicle accidents at a highway/railroad intersection undergoing construction work by both Conrail and Julian. The plaintiffs filed complaints that named both defendants and alleged theories of negligence based on the conduct of the parties at the intersection. Conrail, the owner of the rail line, had directed Julian to improve the intersection. As part of the business relationship, Julian was instructed to obtain insurance coverage for Conrail's benefit. Based on the underlying complaints, Conrail asserted it was an additional insured under a policy that was formed between

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[25] *Id.* at 1256 n.42.

[26] *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 1994 WL 721618 at*3 (Del. Super. Ct. Apr. 8, 1994) (footnotes omitted).

Liberty Mutual and Julian, which Julian had acquired pursuant to Conrail's contractual request. However, Liberty Mutual refused to tender a defense to Conrail, claiming the underlying complaints did not allege any negligence on the part of Julian. Liberty Mutual argued no meaningful linkage existed between Julian's work and Conrail's potential liability to the plaintiffs.

Looking at the two underlying complaints, the Delaware Supreme Court rejected Liberty Mutual's argument and found Conrail qualified as an additional insured under the insurance policy. The Court found a meaningful linkage based on the allegations within the underlying complaints that documented Julian's work and operations. Although the complaint did not set out specific theories of liability against Conrail through Julian's work based on either agency or vicarious liability theories, the Court determined explicit articulation of these theories was not the only way to trigger meaningful linkage.[27] Instead, the Court found that isolated factual allegations within the underlying complaint were sufficient.[28] Specifically, the complaints alleged that Julian failed to use flagmen and either obstructed or removed warning signs at the intersection.[29] But the Court also went on to explain that meaningful linkage could also be inferred based upon the language of the

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[27] *Pacific* at 1257.

[28] *Id.*

[29] *Id.*

underlying complaints.[30] In the underlying complaints, Conrail was alleged to have notice or that it should have known of a dangerous environment.[31] The Court reasoned that an inference could be drawn between Conrail's notice of the dangerous environment created by Julian which had been set out in other areas of the complaints against Julian.[32]

However, in *Pacific*, the Court's duty to defend and meaningful linkage analysis was between two parties who were both named defendants in the underlying complaints. Here, Maryland Casualty has argued the absence of Pro-Tech as a named party in either of the underlying lawsuits is extremely relevant in the Court's duty to defend assessment. Premcor contends Pro-Tech's status as an unnamed party to be irrelevant to the Court's analysis, arguing that the focus must be on the link between Pro-Tech and Premcor.

While the Court finds Pro-Tech's absence from the pleadings is not instantly dispositive of the duty to defend issue, it is, however, fatal to Premcor's ability to establish a meaningful link between Pro-Tech's work and Premcor's liability. For whatever reason, Pro-Tech was neither added as an additional defendant by either the underlying Pennsylvania plaintiffs or Premcor. Therefore, taking the complaints at their face and reading them as a whole, the Court cannot find any ambiguity or risk of liability on the part of Pro-Tech's operations that would trigger Maryland Casualty's duty to defend.

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[30] *Id.*

[31] *Id.*

[32] *Id.*

Premcor has tried to get around this naming issue by bringing to the Court's attention every allegation which uses the word "contractor." It claims that because Pro-Tech was a contractor during the events in question such a reference necessarily establishes some doubt as to whether Pro-Tech was negligent based upon the language of the complaints. The Court finds Premcor's reading of the complaints to establish a meaningful link to be overly strained.

Turning first to the Ferguson amended complaint, Premcor focuses on a series of allegations revolving around various OSHA violations. The allegations state:

> 49. Paragraph (d)(11) requires the host employer, Valero and/or Premcor, to develop and implement procedures to coordinate entry operations when employees of more than one employer are working simultaneously as authorized entrants in the permit space, so that employees of one employer do not endanger the employees of any other employer.
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> 50. In regard to the permit system for permits issued by the Valero and/or Premcor operators, OSHA requires that any permits be canceled when: a condition that is not allowed under the entry permit arises in or near the permit space. *See* § 1910.146(e)(5)(ii).
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> 53. OSHA further has issued regulations regarding the obligation of operator/owners such as Valero and/or Premcor to ensure safe work practices by contractors, communication of hazards to and among contractors, coordination and safety management in multi-contractor worksites, site safety training and compliance for contractors, safety inspection and safety compliance by contractors, and it is believed that Valero and/or Premcor violated these regulations and failed to ensure a safe work site on November 5-6, 2005. *See* 29 CRF §§ 1910.110, 1910.147, 1910.1200 *et seq*.
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> 54. Had Valero and/or Premcor implemented the above mentioned OSHA regulations, the accident and death of John Jerry Ferguson, Jr. could not have occurred.

The Court finds the above allegations lacking any direct discussion on the type of work or operations conducted by the contractors that are mentioned. While one can infer that the various contractors did work at Premcor's refinery, the allegations to contractors are made in passing. They do not concern themselves with the substance of what the contractors did or did not do. Instead, the focus of the allegations is on Premcor's acts and/or omissions in managing the contractors on their property. Unlike *Pacific*, where the underlying complaints specifically alleged that Julian did not employ a flagman and did not post warning signs, etc., here the allegations are devoid of any discussion of Pro-Tech's (or for that matter any contractor's) work. There is no direct allegation here to establish a meaningful link. Read as a whole, it is clear the OSHA violations point solely to the negligence of Premcor, the host employer.

Nor can the Court, with the allegations before it, infer a meaningful link. The simple explanation for this conclusion is Pro-Tech is not named in the pleadings and, therefore, the Court finds it impossible to attach any liability to a party that is not named as a potentially liable party. Further, while the amended complaint obviously attributes knowledge to Premcor of the dangerous conditions at the refinery and the OSHA violations that accompanied the dangers, there is no mention of any specific activities on the part of the contractors being responsible for these OSHA violations. Some reference to the work of Pro-Tech would be required to infer a meaningful link. Even assuming, *arguendo*, the allegations mentioned the work of the contractors in some manner, this Court could not

infer the work of Pro-Tech without Pro-Tech being mentioned by name somewhere within the allegations and as a potentially liable party to the lawsuit.

Premcor cites to an additional allegation in the Ferguson amended complaint but it too fails for the same reasons. The allegation states:

> 80. Defendants were negligent, careless, willful, wanton and reckless, and engaged in intentional malicious conduct with a conscious disregard for human life, resulting in the death of John Jerry Ferguson, Jr., as set forth above as follows:
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> a. failing to warn John Jerry Ferguson, Jr. of the dangers of an active nitrogen purge on the deck of Reactor 1 in the area to which he had been assigned;
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> d. failing to provide appropriate contractor training and oversight to ensure the worker's safety;
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> q. failing to ensure: communication of hazards to and among all contractors; site training for all contractor's to ensure safe job performance by contractors under their control in a multi-contractor work setting; and, uniform nitrogen purge procedures at their refineries throughout the United States.[33]

Again, because Premcor and Valero are the named defendants in the wrongful death suit, the gravamen of the allegation is what Premcor did or failed to do at the refinery. As in the prior allegations, there is no reference to any work the contractors did or did not do at the refinery. Additionally, the Court cannot make any inferences of meaningful linkage because there is no reference to Pro-Tech's work or any work done by any contractor at the refinery.

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Finally, Premcor has referenced the allegations of the Lattanzi wrongful death suit. Like the Ferguson suit before it, the Lattanzi action does not mention Pro-Tech by name or as an additional defendant. The only defendants are Valero and Premcor. The Lattanzi amended complaint contains the following allegation:

> 65. The negligence and/or recklessness of Defendants, Valero and/or Premcor, its agents, servants, and employees consisted, *inter alia*, of the following:
>
> g. negligent and/or reckless failure to properly inspect and supervise the work on Unit 36;
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> q. negligent and/or reckless hiring, supervision, or retention of, employees, and outside contractors;
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> s. negligent and/or reckless policies and/or procedures relating to the rescue of injured workers;
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> v. negligent and/or reckless failure to warn Plaintiffs' decedent of the dangerous conditions and risks involved;
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> z. negligent and/or reckless failure to comply with industry and government safety standards and regulations.

Because neither party has disputed Pro-Tech's relationship to Premcor was that of an independent contractor, the language referring to Premcor's agents, servants and employees would not apply to Pro-Tech. Accordingly, the complaint focuses solely on the negligence of Premcor. However, the Court must pause at the allegation that Premcor was negligent in the retention of contractors. From this allegation, it could be concluded the amended complaint infers that Premcor allowed or kept negligent contractors on its site.

The problem, however, is how this Court might try to attach a meaningful link between Premcor's alleged negligence to that of an unnamed contractor's negligent work and operations that might be inferred from use of the word retention.

As stated before, Premcor's reading is too strained for even this Court to declare a meaningful link between it and Pro-Tech. First, such a reading would require the Court to speculate that Pro-Tech was the negligently retained contractor at the refinery. While the word retention, standing alone, might create some question as to liability of a contractor and potentially trigger the duty to defend, when the Pennsylvania complaints are read as whole, the Court is unable to find any possibility of a meaningful link between Pro-Tech and Premcor. Unlike the *Pacific* case, where the disputing parties were both named in the complaints and allegations of negligence of the insured (Julian) were explicitly stated and intertwined with those of Conrail, the absence of Pro-Tech as a party or even as on-site contractor precludes any inferences the Court might make in favor of Premcor. This conclusion is further supported given the Court is confined to the facts of the underlying complaints. The eighty-two paragraphs of the Lattanzi amended complaint, when read as a whole, are carefully constructed and directed at Premcor and Valero as named defendants. In fact, the only other commercial entity or "contractor" referenced by name is Matrix and its subsidiaries, not Pro-Tech. Further, the references to Matrix only serve to provide factual background as Ferguson's and Lattanzi's employer. The complaints do not describe or mention any work done by Matrix.

The Court has also looked to see if any reasonable inferences can be made in favor of coverage for Premcor. For two reasons, it cannot do so. First, there are no allegations which document any contractor's work or operations (negligent or not) at the refinery which is required to find some meaningful linkage. Second, the reference to negligent retention of contractors refers only to Premcor. Although negligent retention implies that Premcor was on notice or should have been on notice of a negligent contractor at their refinery, there is nothing the Lattanzi complaint for the Court to pinpoint the negligent party as Pro-Tech. While the Court could make such a determination, it declines to do so because it would be entirely speculative. If the Court inferred such negligent retention to Pro-Tech with the complaint before it, such an inference would allow Premcor to bring in any contractor using the "arising out of" language that is typically found in insurance contracts today. The Court considers it improper to speculate to such a degree that an allegation of negligent retention refers specifically to an unnamed party and that the unnamed party is also Pro-Tech (as opposed, for instance, to Matrix). Again, reading the Lattanzi complaint as a whole, the Court, after considering the negligent retention language, still finds no doubt that both amended complaints allege a risk to Pro-Tech.

For a meaningful link to be meaningful, the Court would need some reference to Pro-Tech and its operations. Premcor's strained arguments in favor of a meaningful link between itself and Pro-Tech belie a plain reading of the amended complaints which do not attribute liability to any other parties beside Premcor and Valero. Although the meaningful

linkage standard required by Delaware law is a relatively easy standard to meet, this Court finds Premcor has not adequately shown an allegation or inference of one in either of the underlying Pennsylvania complaints to trigger the duty to defend.

B

Duty to Indemnify

Maryland Casualty further argues that because it does not have a duty to defend Premcor based on the underlying amended complaints, it also has no duty to indemnify Premcor. It argues the duty to defend is broader than the duty to indemnify and states as a general "rule" that if an insurance company has no duty to defend then there, necessarily, will be no duty to indemnify. Although this "rule" often holds out to be proven correct more times than not, courts have recognized it is conceivable that an insurer may have a duty to indemnify a insured where it had no duty to defend.[34]

However, it is settled Delaware law that indemnification is ultimately determined upon the facts that are revealed during discovery or are ultimately be presented at trial.[35] Accordingly, the facts that are uncovered and discovered as the Pennsylvania lawsuits move toward resolution will be considered to determine whether Pro-Tech's involvement

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[34] *Capano Mgmt. Co. v. Transcontinental Ins. Co.*, 78 F.Supp.2d 320, 324 n.1 (D. Del. 1999) (stating it is only likely, but not always, that if there is no duty defend then there will be no duty to indemnify).

[35] *Pike Creek Chiropractic Center, P.A. v. Robinson*, 637 A.2d 418, 421 (Del. 1994).

during the events may trigger the contractual duty to indemnify. Further, even that may not be enough. The factual record in the Pennsylvania lawsuits will probably lack a factual or a sufficient factual record concerning the conduct of Pro-Tech during the event in question and any consideration of the "arising out of" policy language. Since the Pennsylvania lawsuits will not address issues revolving around "arising out of," it would be premature to address indemnification at this juncture. In short, it is not ripe.[36] Accordingly, this Court may need to hold a "full blown" trial in order for a jury to consider whether Pro-Tech's behavior should have triggered Maryland Causality's duty to indemnify under the "arising out of" language.

Therefore, Maryland Casualty's motion is premature considering the ongoing status of the underlying suits.[37] As a result, this Court cannot grant summary judgment in favor Maryland Casualty because their still remains a possibility that the underlying events may give Premcor a right to seek indemnification from the Pro-Tech/Maryland Casualty policy.[38]

C

Bad Faith and Breach of the Implied Covenant of Good Faith and Fair Dealing

Finally Premcor has claimed Maryland Casualty acted in bad faith in failing to properly investigate and defend Premcor in the Pennsylvania lawsuits. In addition,

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[36] *LaPoint v. Amerisourcebergen Corp.*, 2009 WL 623288 (Del. Supr.).

[37] *Capano Mgmt. Co.*, 78 F.Supp.2d at 324 (holding that the duty to indemnify question is premature on a motion to dismiss).

[38] *Charles E. Brohawn & Bros., Inc. v. Employers Commercial Union Ins. Co.*, 409 A.2d 1055, 1058 (Del. 1979).

Premcor claims these actions and the fifteen month period in which Maryland Casualty allegedly withheld the its policy with Pro-Tech constitutes a breach of the implied covenant of fair dealing and good faith. In *Tackett v. State Farm Fire & Cas. Ins. Co.*, the Delaware Supreme Court held that when "an insurer fails to investigate or process a claim…in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations."[39] However, the Court went on to hold that "[a] lack of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer's denial of benefits was 'clearly without any, reasonable justification.'"[40] Because this opinion has concluded that Maryland Casualty does not have a duty to defend, based in large part on the same reasons it denied coverage, the bad faith claim against Premcor may be dismissed at summary judgment. The Court has concluded Maryland Casualty, looking at the underlying allegations, had a reasonable basis to deny coverage.

But Premcor has also claimed Maryland Casualty breached the covenant of good faith and fair dealing. That breach arises, it asserts, from (1) the fifteen month delay in providing the policy; (2) its belated production of the policy only five days before the mediation of the Pennsylvania lawsuits; (3) its perfunctory participation in the mediation; and (4) its inadequate investigation.

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[39] *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995).

[40] *Id.* (citing *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982).

Not much of a factual record has been developed on these allegations and there is a high probability of a genuine factual dispute. It would, therefore, be inappropriate to grant summary judgment on Maryland Casualty's motion for summary judgment on this breach claim.[41]

Conclusion

For the reasons stated herein, Maryland Casualty's motion for summary judgment concerning the duty to defend Premcor is GRANTED. However, because Maryland Casualty's motion for summary judgment as to the duty to indemnify is premature, it is DENIED. Maryland Casualty's motion for summary judgment precluding Premcor's claim of bad faith is also GRANTED. Maryland Casualty's motion for summary judgment on Premcor's claim for breach of the covenant of good faith and fair dealing is DENIED.

IT IS SO ORDERED.

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J.

[41] *Dunlap v. State Farm Fire and Casualty Co.*, 955 A.2d 132, 144 (Del. Super. 2008).