IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DYNCORP; DYNCORP INTERNATIONAL, LLC; DYNCORP TECHNICAL SERVICES, LLC n/k/a CSC APPLIED TECHNOLOGIES, LLC; and DYNCORP AEROSPACE OPERATIONS, LLC, Plaintiffs,	)	
v.	)	C.A. No. 08C-09-218 JRJ
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; CERTAIN LONDON MARKET INSURERS; and DOES 3-20, Defendants.	)	

Submitted: July 27, 2009
Decided: November 9, 2009

Upon Plaintiffs, Dyncorp, DynCorp Technical Services, LLC n/k/a CSC Applied Technologies, LLC and DynCorp International, LLC's Motions for Partial Summary Judgment: **GRANTED.**

OPINION

David Baldwin, Esquire and Jennifer C. Wasson, Esquire, Potter Anderson & Corroon, LLP, Hercules Plaza – Sixth Floor, 1313 North Market Street, Wilmington, DE 19801, Attorneys for Plaintiffs.

Finley T. Harckham, Esquire and Alex D. Hardiman, Esquire, Anderson Kill & Olick, P.C., 1251 Avenue of the Americas, New York, NY, 10020, Attorneys for Plaintiffs.

Thaddeus J. Weaver, Esquire, Christie, Pabarue, Mortensen & Young, P.C., The Brandywine Building, 1000 North West Street, Suite 1200, Wilmington, DE 19801, Attorney for Defendants, Certain Underwriters at Lloyd's, London and Certain London Market Insurers.

Ann C. Taylor, Esquire and Mark A. Deptula, Esquire, Locke Lord Bissell & Liddell, LLP, 111 South Wacker Drive, Chicago, IL, 60606, Attorneys for Defendants, Certain Underwriters at Lloyd's, London and Certain London Market Insurers.

Jurden, J.

I. INTRODUCTION

Before the Court is DynCorp, DynCorp Technical Services, LLC n/k/a CSC Applied Technologies, LLC and DynCorp International, LLC's (collectively "Plaintiffs") Motion for Partial Summary Judgment.[1] Plaintiffs' Motion is filed pursuant to Superior Court Civil Rule 56(c),[2] Rule 57,[3] and 10 *Del.C.* § 6501[4] for breach of contract and declaratory judgment against Certain Underwriters at Lloyd's, London and Certain London Market Insurers (collectively "Defendant Insurers") on the issue of Defendant Insurers' duty to defend.

Plaintiffs argue that: (1) summary judgment is appropriate to require the Defendant Insurers to defend their policyholders; (2) the Defendant Insurers' duty to defend is triggered if the underlying actions contain a potentially covered claim; (3) the Defendant Insurers have the burden of proving that no duty to defend

[1] Plaintiffs filed two separate Motions for Partial Summary Judgment along with supporting briefs. The Court refers to them collectively as "Plaintiffs' Motion for Partial Summary Judgment" because the arguments contained therein are essentially the same. Plaintiffs inadvertently and erroneously included "DynCorp Techserv, LLC" as a movant in the instant Motion. DynCorp Techserv, LLC is not a party.

[2] Superior Court Civil Rule 56(c) provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[3] Superior Court Civil Rule 57 sets forth the procedure for obtaining a declaratory judgment and provides in pertinent part: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

[4] 10 *Del.C.* § 6501states: "Except where the Constitution of this State provides otherwise, courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree."

exists; (4) the policies provide coverage for allegations in the Underlying Actions[5] regarding the INL spraying contract operations; (5) the "spraying exclusion" does not apply because Plaintiffs disclosed the INL spraying contract operations; (6) the Defendant Insurers' reliance on the "Additional Insured" provision has no merit; (7) the Defendant Insurers' reliance on the "Pollution Exclusion" has no merit; (8) the Underlying Actions contain allegations regarding the spraying of herbicide which does not constitute "pollution" or "contamination;" and (9) the Defendant Insurers affirmatively relinquished their rights to deny coverage for both the *Arias* lawsuit and consolidated *Quinteros* lawsuit.

For the reasons that follow, Plaintiffs' Motion for Partial Summary Judgment is **GRANTED**.

II. BACKGROUND

Procedural History

On September 22, 2008, Plaintiffs filed a breach of contract and declaratory judgment suit against Certain Underwriters at Lloyd's, London, Certain London

[5] On September 11, 2001, a proposed class action entitled *Arias et al. v. DynCorp, et al.* ("*Arias* lawsuit") was filed in the United States District Court for the District of Columbia. The complaint named DynCorp, DynCorp Aerospace Technology, DynCorp Technical Services , LLC and DynCorp International, LLC as defendants, and is based on the aerial spraying of a substance in Columbia between January and February 2001. (Pls.' Ex. 6 to Hardiman Aff.). On November 21, 2006, a lawsuit entitled *Quinteros, et al. v. DynCorp, et al.* ("*Quinteros* lawsuit") was filed in the United States District Court for the Southern District of Florida. The complaint named DynCorp Aerospace Operations, DynCorp Techserv, LLC, DynCorp International, LLC and DynCorp as defendants and is based on the aerial spraying of a substance in Columbia from December 1, 2000 to the present. (Pls.' Ex. 7 to Hardiman Aff.). After the *Quinteros* lawsuit was filed, three additional lawsuits (*Province of Sucumbios v. DynCorp et al.; Province of Esmeraldas v. DynCorp et al.; Province of Carchi v. DynCorp et al.*) were subsequently filed and consolidated with the *Quinteros* lawsuit. (Pls.' Exs. 8-10, 13 to Hardiman Aff.). These Underlying Actions have become known as, and will be referred to as, the "*Arias* lawsuit" and "consolidated *Quinteros* lawsuit."

Market Insurers, and Does 3-20 (collectively "Defendants") in connection with certain aviation liability policies ("Policies") sold to Plaintiffs.[6] In their complaint, Plaintiffs allege that Defendants are in breach of their obligation to defend Plaintiffs in the Underlying Actions and request judgment in their favor. In addition, Plaintiffs seek declaratory judgment that Defendants must defend and/or pay defense costs incurred with the Underlying Actions and indemnify Plaintiffs for any settlement payments or judgments in connection with the Underlying Actions.

Underlying Actions / Coverage

This suit stems from Plaintiffs being sued in a number of underlying lawsuits for which they now seek defense and indemnification under the Policies. These Underlying Actions arise out of Plaintiffs' aerial spraying of a substance over the country of Columbia from December 1, 2000 to the present, to eradicate drug crops pursuant to a contract with the United States government ("INL contract").[7] The plaintiffs in the Underlying Actions seek damages for bodily

[6] For the purposes of this Motion, Defendants sold Plaintiffs various aviation liability insurance policies providing insurance coverage from December 31, 1998 to December 31, 2003. The insureds are DynCorp and its subsidiaries. The relevant terms of these policies remained the same throughout this time period. (Pls.' Exs. 1-5 to Hardiman Aff.).

[7] It is not certain as to whether the aerial spraying continues to date. The timeframe "December 1, 2000 to the present" is the timeframe indicated in the complaints of the consolidated *Quinteros* lawsuit.

injuries, property damage and damage to natural resources as a result of the aerial spraying operations.[8]

Following the commencement of the *Arias* lawsuit, Defendant Insurers denied coverage under the Policies.[9] On January 9, 2002, Lord Bissell & Brook ("Lord Bissell"), acting in the role of the claims administrator for Defendant Insurers, prepared a coverage opinion addressing whether there was coverage for Plaintiffs for the claims alleged in the *Arias* lawsuit.[10] That opinion provided that no coverage would exist under the Policies for the *Arias* lawsuit if: (1) Plaintiffs had an ownership interest in the aircraft used in the spraying operation or (2) the spraying operation had not been declared to Defendant Insurers.[11] In response, Plaintiffs wrote to Lord Bissell on July 17, 2002, advising that Plaintiffs did not have an ownership interest in the aircraft[12] and enclosing a copy of the "DynCorp Aviation Liability Renewal Specifications" which had been provided to Defendant Insurers as part of the application disclosures for the Policies, demonstrating that Defendant Insurers were given notice of the spraying operations under the INL

[8] Both Plaintiffs and Defendant Insurers agree that the *Arias* and consolidated *Quinteros* lawsuits contain essentially the same allegations and causes of action. (Pls.' Br. 7, Defs.' Resp. Br. 5). However, Plaintiffs aver that underlying suits allege bodily injury and property damage as a result of the aerial spraying operations, while Defendant Insurers allege that the suits also include damage to natural resources. (Pls.' Br. 6-7, Defs.' Resp. Br. 3). For the purposes of the instant motion, this difference is immaterial. As long as one count in the underlying complaint is within the policy coverage, the duty to defend will arise. *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103-105 (Del.1974)).

[9] Defendant Insurers continue to deny coverage for the *Arias* lawsuit although the basis for such denial has changed over time.

[10] Pls.' Ex. 14 to Hardiman Aff.

[11] *Id.* ("If DynCorp had any ownership interest in the aircraft used in the spraying operation, the claim falls outside the definition of 'Aircraft Hazard' and no coverage is provided for the claim. In addition, if the spraying operation was not declared to the Underwriters, the operation would be excluded from coverage by Exclusion 7(b).")

[12] Pls.' Ex. 15 to Hardiman Aff.

contract.[13] On September 23, 2002, Lord Bissell advised Plaintiffs that Defendant Insurers were refusing to defend or indemnify Plaintiffs in the *Arias* lawsuit,[14] and, for the first time, Lord Bissell raised two other grounds for denying coverage: (1) that the provision pertaining to any additional insureds actually excluded coverage for Plaintiffs for any liability incurred with the INL contract; and (2) that coverage for the INL contract operations, and any allegations in the Underlying Actions relating to those operations, were excluded under the exclusion for pollution and contamination.[15]

With respect to the consolidated *Quinteros* lawsuit, Plaintiffs gave notice of the consolidated *Quinteros* lawsuit to Defendant Insurers on December 5, 2006.[16] There is no evidence that coverage was ever denied. Rather, Plaintiffs were advised by Defendant Insurers' claims administrator, Locke, Lord, Bissell & Liddell, LLP, that payment of defense costs for the consolidated *Quinteros* lawsuit would be recommended to Defendant Insurers.[17]

To date, Defendant Insurers have not made any defense cost payments for the *Arias* lawsuit or consolidated *Quinteros* lawsuit.

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[13] *Id.*
[14] Pls.' Ex. 16 to Hardiman Aff.
[15] *Id.*
[16] Pls.' Ex. 17 to Hardiman Aff.
[17] Pls.' Exs. 18-19 to Hardiman Aff.

III. STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[18] The facts must be viewed in the light most favorable to the non-moving party.[19] The burden is on the moving party to establish that no genuine issue of material fact exists.[20] Once this is demonstrated, the burden then shifts to the non-moving party to demonstrate that there are material issues of fact requiring trial."[21]

The parties agree that no choice of law issue exists because there is no conflict between the potentially applicable state laws.[22] As such, the Court will rely on Delaware law in disposing of this motion.

IV. DISCUSSION

"In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by

[18] Superior Court Civil Rule 56(c).
[19] *Urena v. Capano Homes, Inc.*, 901 A.2d 145, 150 (Del.Super. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).
[20] *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).
[21] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Hurtt v. Goleburn*, 330 A.2d 134, 135 (1974)).

[22] *See* Pls.' Br. 11, Defs.' Resp. Br. 10.

the policy, thereby triggering the duty to defend."[23] The Delaware Supreme Court has set forth the test to determine whether an insurer is bound to defend an action against its insured:

> The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy. Determining whether an insurer is bound to defend an action against its insured requires adherence to the following principles: (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[24]

As indicated in prong three of the test, a duty to defend extends to all causes of action in the underlying complaint as long as one of the causes of action is within the policy coverage.[25] The duty to defend is broader than the duty to indemnify, because the duty to defend includes claims that are *potentially* covered.[26]

The parties agree that the Policies are unambiguous. Under Delaware law, clear and unambiguous language in insurance policies should be given ordinary,

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[23] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.* 956 A.2d 1246, 1254 -1255 (Del. 2008)(quoting *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000)).
[24] *Pacific Ins. Co.* 956 A.2d at 1254 -1255 (citing *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103-105 (Del.1974)).
[25] *Cont'l Cas. Co.*, 317 A.2d at 105.
[26] *Keystone Ins. Co. v. Walls*, 2006 WL 1149143, at *4-5 (Del. Super. Jan.31. 2006).

usual meaning.[27] Additionally, it is a fundamental rule that insurance policies must be construed as a whole. "[A] court's interpretation of an insurance contract must rely on a reading of all of the pertinent provisions of the policy as a whole, and not on any single passage in isolation."[28] Thus, the Policies must be examined as a whole and the provisions must be given ordinary, usual meaning to determine whether Defendant Insurers have a duty to defend Plaintiffs in the Underlying Actions.

The Policies[29]

A review of the Policies as a whole demonstrates that the Underlying Actions against Plaintiffs state a claim covered by the Policies, thereby triggering Defendant Insurers' duty to defend. The Policies provide in relevant part:

> **SECTION ONE – COVERAGES**
>
> 1. BODILY INJURY OR PROPERTY DAMAGE
>
> To pay on behalf of the Insured all sums which the Insured shall become legally liable to pay as damages for Bodily Injury or Property Damage caused by an Occurrence during the period of insurance arising out of . . . the Aircraft Hazard . . . .

[27] *Johnson v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del.Super.1973).
[28] *O'Brien v. Progressive Northern Ins. Co*., 785 A.2d 281, 287 (Del. 2001)(citing *Aetna Cas. and Sur. Co. v. Kenner*, 570 A.2d 1172, 1174 (Del. 1990)).
[29] Although the language of the Policies differ to some extent, the differences are immaterial and do not change the interpretation of the Policies or affect the issues to be decided in the instant Motion. All of the provisions quoted herein have been taken from Policy ACA1194 which was issued on December 31, 1998 for 36 months.

SECTION THREE – DEFINITIONS

1. "AIRCRAFT HAZARD"

The term "Aircraft Hazard" means liability arising out of the operation of Aircraft not owned in whole or in part by the Insured but leased and/or operated by or on behalf of the Insured.

* * *

4. "BODILY INJURY"

The term "Bodily Injury" means bodily injury(including mental anguish, shock or fright) sickness or disease including death at any time resulting therefrom.

* * *

14. "OCCURRENCE"

The term "Occurrence" means an accident including injurious exposure to conditions (other than a Grounding) arising out of the Hazards insured herein causing, during the period of insurance, Bodily Injury or Property Damage which is neither expected nor intended. A series of accidents or Occurrences following as a consequence of one Occurrence, shall, with such Occurrence, be deemed to be one Occurrence.

* * *

19. "PROPERTY DAMAGE"

The term "Property Damage" means loss of or damage to property including loss of use thereof arising therefrom and as regards the Baggage/Personal

> Effects/Cargo/Mail Hazard, includes damage occasioned by delay.

The Policies provide that Defendant Insurers agree to provide defense coverage for suits involving claims that allege "Bodily Injury" or "Property Damage" arising out of an "Aircraft Hazard":

> **SECTION ONE – COVERAGES**
>
> * * *
>
> 3. DEFENCE SETTLEMENT, SUPPLEMENTARY PAYMENTS
>
> A. To defend in the name of and on behalf of the Insured any suit or other proceedings, even if groundless, false, fraudulent, brought against the Insured alleging Personal Injury, Bodily Injury, or Property Damage . . . and seeking damages on account thereof . . . .

Finally, the Policies specifically reference "crop dusting" and "spraying" by aircraft but provide coverage only for declared[30] aircraft spraying operations:

> **SECTION TWO – EXCLUSIONS**
>
> THIS POLICY DOES NOT APPLY;
>
> * * *
>
> 7. WITH RESPECT TO THE AIRCRAFT HAZARD,
>
> * * *

[30] Emphasis added.

> (b) while the Aircraft is being used for or in connection with any race, speed or endurance test, any attempt at record breaking, acrobatic flying, crop dusting, spraying, seeding, fertilisation, hunting, bird or fowl herding unless such use is declared to the Insurers.

After examining the Policies as a whole and upon assigning the obvious, usual meaning to these provisions, the Court finds that the Policies provide Plaintiffs coverage and defense for bodily injury or property damage arising out of aircraft hazards as long as two conditions are met: 1) the aircraft is not owned in whole or in part by the insured; and 2) the use was declared to Defendant Insurers.[31]

Because the evidence demonstrates that both of these conditions have been met, Defendant Insurers have a duty to defend Plaintiffs in the Underlying Actions. As noted previously, subsequent to the filing of the *Arias* lawsuit, Plaintiffs requested an opinion from Defendant Insurers with regard to whether coverage existed under the Policies.[32] Lord Bissell responded by advising Plaintiffs that coverage would be denied unless Plaintiffs did not have any ownership interest in

[31] To the extent that the Defendant Insurers aver that that the underlying actions also allege damage to natural resources (*see supra* note 8), the duty to defend such claims would also exist even if coverage for such claims is not explicit. Prong (3) of the test adopted by the Delaware Supreme Court provides that if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises. *Pacific Ins. Co.* . 956 A.2d at 1254 -1255 (citing *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.,* 317 A.2d 101, 103-105 (Del.1974)).The same reasoning applies to Defendant Insurers' argument that the Policies do not cover claims where the aircraft is being used for an "unlawful purpose." First, at this stage, we are dealing with mere allegations in the underlying actions. None of Plaintiffs conduct has been rendered "unlawful." Also, the underlying actions contain numerous causes of action against Plaintiffs, several of which are not violations of law. Because a duty to defend extends to all causes of action as long as one cause of action is potentially covered, Defendant Insurers' "unlawful purpose" argument fails for this reason also.

[32] *See supra* p. 6-7.

the aircraft and the spraying operations were declared[33] to Defendant Insurers.[34] Plaintiffs thereafter advised Lord Bissell that Plaintiffs did not have any ownership interest in the aircraft used in the spraying operations, and provided documentation to show that the spraying operations were declared to Defendant Insurers.[35] Declaration of the spraying operations is further evidenced in the Policies themselves. The INL contract is actually referenced in the Policies in a provision regarding additional insureds ("Additional Insured Provision").[36]

The Additional Insured Provision

While the Additional Insured Provision excludes coverage for certain additional insureds, it does not exclude coverage for Plaintiffs. The Additional Insured Provision provides, in pertinent part:

> **SECTION 4 – CONDITIONS**
>
> 1. CONTRACTUAL LIABILITY
>
> * * *

[33] The term "declared" is not defined within the Policies, however, according to Merriam-Webster "declare" means "to make known formally, officially, or explicitly."
[34] Pls.' Ex. 14 to Hardiman Aff.
[35] Pls.' Ex. 15 to Hardiman Aff. In addition, a follow-up letter from Lord Bissell does not dispute Plaintiffs' representation that they did not have any ownership interest in the aircraft or that that the spraying operations were disclosed. Furthermore, there is no request by Defendant Insurers, or anyone acting on their behalf, that Plaintiffs provide additional evidence of such. Accordingly, to the extent that Defendant Insurers argue that Plaintiffs did not provide sufficient evidence demonstrating that they did not have an ownership interest in the aircraft or that the spraying operations were not disclosed, such argument is waived. However, even absent a waiver of this argument, disclosure of the spraying operations is evidenced in the Policies because the INL contract is cited in the Policies. In addition, Plaintiffs filed an Affidavit on June 29, 2009, affirming that Plaintiffs had no ownership interest in the aircraft used for spraying operations. (Resnick Aff., at ¶ 3, D.I. 36).
[36] This provision was one of the bases for the denial of coverage in Lord Bissell's September 23, 2003 mentioned *supra*.

> (i) with respect to the INL Contract, EAST Inc. and Global and Associates are included as Additional Named Insureds solely as respects their respective operations under the INL Contract on behalf of DynCorp. However, this insurance shall not apply in respect of liability for Bodily Injury or Property Damage caused directly by drifting compounds or seeds or pesticides dropped sprayed or emitted intentionally or otherwise[.]

Defendant Insurers argue now that this provision somehow operates to exclude all spraying coverage in the Policies for all insureds including Plaintiffs. The Court finds the provision only applies to the additional insureds referenced within, but not for Plaintiffs. If Defendant Insurers meant to exclude all spraying coverage from the Policies, they would have done so clearly and unambiguously in the exclusion section of the Policies, not in a sentence in a provision regarding additional insureds. Further, when taking all provisions of the Policies into account, it would be illogical to find that Defendant Insurers intended to exclude Plaintiffs under the additional insured provision, because such a finding would be irreconcilable with the provision which provides coverage for declared "crop dusting" and "spraying."

The Pollution Exclusion

Defendant Insurers contend that the AVN 46B Exclusion ("Pollution Exclusion") bars coverage for the Underlying Actions. This provision provides in pertinent part:

SECTION TWO – EXCLUSIONS

THIS POLICY DOES NOT APPLY;

* * *

10. WITH RESPECT TO ALL HAZARDS INSURED HEREON.

(a) NOISE AND POLLUTION AND OTHER PERILS EXCLUSION CLAUSE AVN 46B

1. This Policy does not cover claims directly or indirectly occasioned by, happening through or in consequence of:-

* * *

(b) pollution and contamination of any kind whatsoever[.]

Plaintiffs' spraying operations do not fall within this exclusion. First, the Additional Insured Provision references "spraying" under the INL contract. This demonstrates that the spraying operations of Plaintiffs pursuant to the INL contract were not intended to be excluded under the pollution exception. Also, the Policies contain a separate exclusion for undeclared "crop dusting" and "spraying." Again, if the spraying operations of Plaintiffs were intended to fall under the Pollution Exclusion, there would not be a need to have a separate exclusion for undeclared "crop dusting" and "spraying."

Collateral Matters

Defendant Insurers raise several additional arguments which they assert preclude summary judgment. None of these arguments preclude summary judgment on the duty to defend.

Defendant Insurers contend that: (1) questions persist as to rights of DynCorp International, LLC ("DynCorp International"); (2) the statute of limitations precludes claims for the *Arias* lawsuit;[37] (3) no allegations impact Insurance Contract No. ACA1194; and (4) coverage is precluded after December 31, 2001 because of the "known loss" theory.

Rights of DynCorp International

Defendant Insurers allege that DynCorp International was never assigned rights under the Policies which are the subject of this Motion. Defendant Insurers claim that the Policies were issued in favor of "DynCorp and its Affiliated and Associated and/or Subsidiary Companies as may now or hereafter be constituted," that DynCorp International is no longer affiliated with the named insured, and thus, that DynCorp International has no rights under the Policies by operation of law.

Defendant Insurers agree that DynCorp International was formed on December 27, 2000, operated as a subsidiary of DynCorp, and that DynCorp and its subsidiaries were subsequently acquired by Computer Science Corporation

[37] Defendant Insurers have withdrawn their statute of limitations argument. Therefore, this argument will not be addressed. *See* Tr. Oral Argument, 80:14-15, Jun. 15, 2009.

(CSC).[38] DynCorp International was purchased from CSC by Veritas Capital Fund II, L.P. ("Veritas") but not until December 21, 2004.[39] Thus, during the policy periods at issue, December 31, 1998 to December 31, 2003, DynCorp International was a subsidiary of DynCorp, and was therefore an insured under the Policies.[40]

Insurance Contract No. ACA1194

Defendant Insurers next argue that there are no allegations in the Underlying Actions which impact insurance contract no. ACA1194.[41] Defendant Insurers contend that the parties agreed to the terms of contract number ACA1194 for a period of three years beginning on December 31, 1998, however, the contract was subject to annual resigning. They argue that because the Underlying Actions allege damages beginning on December 1, 2000, there are no potential allegations that could possibly come within the period of the insurance contract, December 31, 1998 to December 31, 1999.

Insurance policy ACA1194 was issued on December 31, 1998 and was a 36 month policy.[42] Although it was subject to annual resigning, the terms and policy numbers remained the same over the three-year period.[43] Thus, the allegations in the Underlying Actions do concern insurance contract no. ACA1194 because the

[38] Defs.' Resp. Br. 11.
[39] Pl. DynCorp International's Ex. 17 to Hardiman Aff.; Pls.' Br. 20, Defs.' Resp. Br. 11.
[40] Since DynCorp International LLC was not formed until December 27, 2000, it would only naturally be insured under the Policies from the date of its formation onward. *See supra* note 5.
[41] Pls.' Exs. 1-3 to Hardiman Aff.
[42] Pls.' Ex. 1 to Hardiman Aff.
[43] Pls.' Exs. 1-3 to Hardiman Aff.

damages alleged in the Underlying Actions (damages from aerial spraying operations from December 1, 2000 to the present) fall within the ACA1194 coverage period of December 31, 1998 – December 31, 2001.

"Known Loss" Argument

Last, Defendant Insurers argue that under the "known loss" theory, coverage is precluded after December 31, 2001, because once Plaintiffs were served with the *Arias* litigation[44] they knew and/or had reason to know that ongoing spraying operations were reasonably likely to result in further alleged injuries and claims. As such, Defendant Insurers contend that Plaintiffs are unable to bring claims within the Policies and within the definition of "Occurrence" under policy numbers AFA1194[45] and AGA1194[46] which were effective from December 31, 2001 – December 31, 2003.

"Occurrence" is defined as "an accident including injurious exposure to conditions (other than a Grounding) arising out of the Hazards insured herein causing, during the period of insurance, Bodily Injury or Property Damage which is neither expected nor intended."[47] At this stage, the Underlying Actions are still pending. Plaintiffs have denied the allegations in the Underlying Actions and continue to do so. The Court is unaware of any determination which has been

[44] The *Arias* lawsuit was filed on September 11, 2001.
[45] *See* Pls.' Ex.4 to Hardiman Aff.
[46] *See* Pls.' Ex.5 to Hardiman Aff.
[47] *See* supra p. 11.

made linking Plaintiffs' aerial spraying operations in Columbia to the injuries and damages alleged in the underlying complaints. There is no evidence to demonstrate that Plaintiffs either expected or intended at the time in which polices AFA1194 and AGA1194 were entered into that their aerial spraying in Columbia would cause the injuries and damages alleged in the underlying complaints, and that a loss would occur. Furthermore, as discussed previously, a duty to defend arises when claims are *potentially* covered.[48] Even 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.[49] Based on the foregoing, Defendant Insurers' "known loss" argument is unpersuasive.

V. CONCLUSION

For these reasons, Plaintiffs' Motion for Partial Summary Judgment on the issue of Defendant Insurers' duty to defend is **GRANTED.**

IT IS SO ORDERED.

[48] *See supra* p. 9.; *Keystone Ins. Co.* 2006 WL 1149143, at *4-5.
[49] *See supra* p. 9.; *Pacific Ins. Co.* . 956 A.2d at 1254 -1255.

Jan R. Jurden, Judge

cc: Prothonotary - Original